Supreme Court, U.S.
FILED

93 1975 JUN 9 1994

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

June 9, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

92 pp

QUESTIONS PRESENTED

1. Whether the court of appeals on habeas review erred by failing independently to review the state court's determination of petitioner's competency to withdraw from a plea agreement after the full performance of his obligations under the agreement when the state court had not applied the constitutionally mandated standard to its findings of fact.

2. Whether the allocation of the burden of proof expressed in 28 U.S.C. § 2254(d)'s "presumption of correctness" trumps the requirements for holding a federal evidentiary hearing mandated by this Court's decision in *Townsend* v. *Sain*.

3. Whether a superseding indictment may extend the strict time limits established by the Interstate Agreement on Detainers within which a prisoner must be brought to trial.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	24

TABLE OF AUTHORITIES

CASES — Page

Birdwell v. *Skeen*, 983 F.2d 1332 (5th Cir. 1993).. 23
Carchman v. *Nash*, 473 U.S. 716 (1985) 20
Card v. *Singletary*, 981 F.2d 481 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 121 (1993) 12, 16
Crockett v. *Noles*, No. 89-5924, 1990 U.S. App. LEXIS 9523 (6th Cir. June 12, 1990) 12
Demosthenes v. *Baal*, 495 U.S. 731 (1990) 13
Dixon v. *Jacobs*, 427 F.2d 589 (D.C. Cir. 1970).... 12
Dusky v. *United States*, 271 F.2d 385 (8th Cir. 1959) 15
Dusky v. *United States*, 362 U.S. 402 (1960) 13, 14
Fex v. *Michigan*, 113 S. Ct. 1085 (1993) 21
Flugence v. *Butler*, 848 F.2d 77 (5th Cir. 1988).... 12
Godinez v. *Moran*, 113 S. Ct. 2680 (1993) 14
Griffin v. *Lockhart*, 935 F.2d 926 (8th Cir. 1991).. 12
James v. *Singletary*, 957 F.2d 1562 (11th Cir. 1992) 12
Keeney v. *Tamayo-Reyes*, 112 S. Ct. 1715 (1992).. 16, 18
Lafferty v. *Cook*, 949 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992) 13, 14, 17
Levine v. *Torvik*, 986 F.2d 1506 (6th Cir.), *cert. denied*, 113 S. Ct. 3001 (1993) 12
Maggio v. *Fulford*, 462 U.S. 111 (1983) 13
New Mexico v. *Shaw*, 651 P.2d 115 (N.M. Ct. App. 1982) 22
People v. *Allen*, 744 P.2d 73 (Colo. 1987) 23
People v. *C'Allah*, 474 N.Y.S.2d 305 (N.Y. App. Div. 1984) 22
Price v. *Wainwright*, 759 F.2d 1549 (11th Cir. 1985) 12
Ricketts v. *Adamson*, 483 U.S. 1 (1987) 10
Spitzweiser-Wittgenstein v. *Newton*, 978 F.2d 1195 (10th Cir. 1992) 12
State v. *King*, 733 P.2d 472 (Or. Ct. App. 1986), *review denied*, 737 P.2d 1248 (Or. 1987) 9
Stroble v. *Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979) 20
Sumner v. *Mata*, 449 U.S. 539 (1981) 18
Townsend v. *Sain*, 372 U.S. 293 (1963) 16, 17

TABLE OF AUTHORITIES—Continued

Page

United States v. *Cephas*, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992) 22
United States v. *Ford*, 550 F.2d 732 (2d Cir. 1977) 23
United States v. *Hemsi*, 901 F.2d 293 (2d Cir. 1990) 14
United States v. *Mauro*, 436 U.S. 340 (1978) 20

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV, § 1 2
28 U.S.C. § 2254(d) 2, 10, 18
Interstate Agreement on Detainers, Or. Rev. Stat. § 135.775 ..... 2, 19, 20, 21

OTHER AUTHORITY

Rule 8(a) & Advisory Committee Note, Rules Governing Section 2254 Cases in the United States District Courts 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. ———

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Haden King, Jr. hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 8 F.3d 1403 (9th Cir. 1993) and is included in the Appendix at pp. 1a-26a. The order of the district court adopting the findings and recommendation of the magistrate judge is not reported and is included in the Appendix at pp.

27a-28a. The findings and recommendation of the magistrate are included in the Appendix at pp. 29a-40a.

JURISDICTION

The decision of the court of appeals was entered on November 3, 1993. Rehearing was denied on March 11, 1994. App. 41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

28 U.S.C. § 2254(d) is included in the Appendix at p. 42a.

The Interstate Agreement on Detainers, codified by Oregon at Or. Rev. Stat. § 135.775, is included in the Appendix at pp. 43a-51a. The statute is also found at 18 U.S.C. app. § 2.

STATEMENT

Something is rotten in Oregon. In return for petitioner's substantial and life-threatening cooperation in testifying repeatedly against a reputed organized crime figure, the state agreed to limit petitioner's sentence after a guilty plea to a ten-year term concurrent to his current confinement. Petitioner fully satisfied each of his obligations under the agreement. Nevertheless, the state revoked the plea agreement and petitioner was convicted and sentenced to at least 30 years of imprisonment *consecutive* to his current confinement. The state justified this revocation on the ground that, despite his full performance, petitioner had not formally entered his plea. The majority below up-

held his conviction because, at the time the state trial court deemed petitioner to have withdrawn from the guilty plea, he was presumptively "competent," notwithstanding that he could not possibly have benefitted by refusing to plead guilty.

The divided holding of the court of appeals denying habeas relief in this case, which presumed that the state court's determination of competency was correct, conflicts with the holdings of three other courts of appeals and decisions of this Court stating that such a presumption is not appropriate on this legal issue. The decision of the court of appeals also conflicts in two other significant respects with the decisions of various courts of appeals. For these reasons, the decision below warrants review by this Court.

A. Factual Background

Petitioner has been incarcerated in a state penitentiary in Washington since 1982. Late in 1982 Oregon moved pursuant to the Interstate Agreement on Detainers ("IAD") to have petitioner sent to Clackamas County, Oregon, for the purpose of standing trial for the murder of Julie Salter, the ex-wife of James Salter, a Seattle attorney with reputed connections to organized crime. James Salter was alleged to have hired petitioner to arrange for the murder of Salter's ex-wife. Unaware that the Oregon indictment had been obtained in knowing violation of Oregon's constitution, the state of Washington transferred petitioner to Oregon.

Petitioner and the state of Oregon entered a plea agreement on August 3, 1983. Petitioner agreed to cooperate with the investigation into Julie Salter's murder and to testify against James Salter or any other person whom the state might indict in connection with its investigation. In exchange for this substantial assistance by petitioner, the state agreed to

> allow the defendant to enter a plea of guilty to the charge of murder with the understanding that the

> defendant will receive a life sentence with an order that he serve a minimum of ten years before being eligible for parole, and that said sentence will run concurrent to any sentence the defendant is now serving.

Exh. 110, App. 53a.[1]

Petitioner's agreement to testify against James Salter was reported widely in the media in Oregon and Washington. Exh. 42 at 1 - 236. Petitioner's life immediately was threatened, both from inside and outside the correctional system. As a result, the Clackamas County Sheriff's Department was forced to take the most extreme security measures it had ever implemented in its attempt to protect petitioner from being killed. Motion for Reconsideration before the District Court, Exh. B (filed Mar. 20, 1992). Among other things, the Sheriff's Department prohibited anyone but his attorneys from visiting petitioner for all but two hours every week. *Id.* at 5 (Clackamas County Sheriff's Department directive, Dec. 15, 1983). It also required petitioner to wear a bulletproof vest every time he left the jail, which was three miles from the courthouse. *Id.* at 4 (directive, Dec. 16, 1983). When in transit to and from the jail, petitioner was disguised to conceal his identity and transported by different routes. *Id.* at 15 (affidavit of Deputy Sheriff Ronald Crader, Apr. 25, 1984). Everywhere petitioner went, he was always accompanied by large number of deputy sheriffs. *Id.* at 18 (affidavit of Deputy Sheriff Gary Sizemore, Apr. 3, 1984). The Sheriff's Department did not consider even his cell to be safe and had armored plates welded over his cell windows as well as those nearby. One deputy sheriff, who personally had received a threat to petitioner's life while off duty, stated that even he was "highly alarmed" and "paranoid" as a result. *Id.* at 12 (affidavit of Deputy

---

[1] In conformity with the opinion of the court of appeals, the state court record is referred to by exhibit numbers, ("Exh. ——"), since the record was designated as "exhibits" before the district court on habeas review.

Sheriff Tim Finch, Apr. 25, 1984). As Judge Pregerson explained, the threats and security precautions no doubt "exacerbated" petitioner's emotional problems and left petitioner in a "precarious mental state." App. 26a.

Nonetheless, in reliance on the plea agreement, petitioner began performing his side of the bargain and cooperated completely with the state. Petitioner met with state investigators and provided them with information about Julie Salter's murder. In December 1983, petitioner testified against James Salter before a grand jury. Salter was indicted and petitioner testified at his bail hearing in January 1984.

Petitioner was more susceptible to pressures than an ordinary inmate because he had suffered a significant brain injury as a result of an airplane crash in 1979. Petitioner had required extensive psychiatric care since then, both in his home state of Alabama in 1979, and in Washington thereafter. To ameliorate the effects of his brain injury, petitioner was taking the following prescription medications: Tegretol, an anticonvulsant; Dilantin, an antiepileptic; Haldol, an antipsychotic; and Lithium. The circumstances surrounding his appearance as state's witness exacerbated petitioner's existing mental condition. He became convinced that if he were released into the general prison population in either Washington or Oregon he would be killed immediately as a "snitch." As a result, he requested permission to serve his sentence in the prison system of Alabama where the vast media coverage of the Salter trial was less threatening.

In late February 1984, shortly after testifying against Salter at his bail hearing, petitioner, in despair, stopped taking his medications and sent the Clackamas County Court a handwritten note seeking to represent himself and to discharge his attorneys, claiming they had put his life in jeopardy. Specifically, petitioner sought to withdraw from all "life endangering" plea agreements. When asked by the court to explain his request, petitioner complained

that his attorneys had not been able to arrange for his transfer to Alabama after he had finished testifying against Salter. Counsel at that time informed the court that petitioner was no longer taking his medication.

The court then ordered Dr. Parvaresh, a board-certified psychiatrist, to examine petitioner to determine his competency to represent himself. Dr. Parvaresh informed the court that, as a result of his underlying psychiatric disorder, petitioner was not competent to represent himself, stand trial, or assist in his own defense. Exh. 111, App. 57a-58a. Specifically, petitioner was "emotionally and mentally confused and disorganized" and suffered from "paranoid ideation" directed at those around him, including his attorneys. *Id.* at 57a.

The state then moved to have petitioner examined further at the Oregon State Hospital. While this motion was under consideration, petitioner attempted to commit suicide by hanging himself with a mattress cover, but a Sheriff's Deputy cut him down and resuscitated him. Brief on Motion for Reconsideration before the District Court at 6, Exh. 2H (filed May 18, 1992). On March 12, 1984, the court, finding "reason to doubt defendant's fitness to proceed," agreed to the State's request and sent petitioner to the state hospital in Salem. A physician there determined that petitioner had an organic personality syndrome as a result of the airplane crash and had suffered a marked change in his personality that affected his emotions, attitudes, behavior and social judgment. Exh. 119 at 489-90. Nevertheless, the physician, a long-time family doctor who had completed a three-year psychiatric training program, noted that petitioner's memory was intact and that he could understand court procedure, and concluded that petitioner was competent "to aid and assist in his own defense." *Id.* at 493. This conclusion was reached after conducting less than an hour of interviews. *Id.* at 497-98.

During the one-week period petitioner was away from the relatively secure environment of the Clackamas County

jail and in the general hospital population, a prisoner attempted to kill him. Petitioner was stabbed in the eye with a pencil for being a "snitch." Motion for Reconsideration before the District Court, Exh. B at 33 (filed Mar. 20, 1992); Exh. 119 at 496.

After this attack, Dr. Larsen, another board-certified psychiatrist who had previously examined petitioner, examined him on successive days. Dr. Larsen concluded that petitioner was continuing to refuse medication and was actively psychotic, consistent with the conclusion reached by Dr. Parvaresh. Exh. 112 App. 59a-62a. He found that petitioner's insight and judgment were impaired and that he was highly paranoid. *Id.* at 61a. He also noted that petitioner suffered from paranoid ideation directed against his attorneys. *Id.*

Despite the threats to and the attempt on his life and the unresolved status of his competency, the state insisted that petitioner continue to perform his part of the plea bargain so that it could successfully prosecute Salter. The court continued petitioner's competency proceedings during this period. In April 1984, petitioner spent three days on the stand, two under cross-examination, testifying against Salter at his trial. The toll on petitioner, however, continued to be great, and on May 4, 1984, he once again attempted suicide. Motion for Reconsideration before the District Court at 3 (filed May 1, 1992). On May 10, 1984, despite petitioner's best efforts, Salter was acquitted.

Petitioner's competency proceedings resumed in May 1984, and on May 31, 1984, the court found petitioner competent to stand trial. Exh. 119 at 519. Despite having performed fully his end of the plea agreement, petitioner did not enter a formal plea of guilty at this time. As a result, despite the fact that the state had agreed to *allow* petitioner to enter a plea of guilty and had not set any particular time for the plea, it asked the court to find that petitioner had withdrawn from the plea agreement.

Id. at 520. One of petitioner's attorneys, Michael Clancy, specifically appointed to assist petitioner in the prison transfer process, asked the court to delay ruling on the state's motion to allow the Alabama Parole Board time to consider petitioner's request for a transfer. *Id.* at 525. Clancy hoped that if the custody issue could be resolved, petitioner then would be able to make an "intelligent" decision about whether to enter a guilty plea. *Id.*

There was absolutely no rational basis for petitioner to go to trial. If the state accepted petitioner's guilty plea as required by the plea agreement, petitioner would return to Washington to serve out his substantial, but concurrent sentence there. On the other hand, if petitioner went to trial, the best he could hope for was an acquittal that would achieve precisely the same result—a return to Washington to serve out the remainder of his sentence there. However, if he lost at trial, he faced the prospect of serving a life term in Oregon *in addition to* completing his Washington sentence. Petitioner's mental defect, exacerbated by his failure to take medication and his fear of repercussions following his testimony against Salter, rendered him incompetent to withdraw from the plea agreement.

Nevertheless, the court refused petitioner's request and entered an order "relieving the State from any obligation that was originally involved in the plea agreement" because petitioner had not yet entered a guilty plea. *Id.* at 526-27. A few weeks before the trial began, petitioner attempted to enter a guilty plea but the court refused to enforce the plea bargain.

Having refused petitioner's tender of a guilty plea as provided by the plea agreement, the state took him to trial. Petitioner was convicted of aggravated murder and was sentenced to life imprisonment with a minimum of 30 years before eligibility for parole. The sentence was to run *consecutive* to his Washington incarceration. In addition, petitioner was ordered to reimburse the state

$96,500 for the expenses of his defense. Petitioner was then returned to Washington. The state of Washington immediately sent petitioner to Alabama, where he remained in protective custody for 18 months before being returned. Petitioner appealed his Oregon conviction and exhausted all state remedies. See *State* v. *King*, 733 P.2d 472 (Or. Ct. App. 1986), *review denied*, 737 P.2d 1248 (Or. 1987).

B. Proceedings Below

Petitioner filed a petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Oregon on April 3, 1990. Petitioner alleged that the state (1) violated the Due Process Clause of the Fourteenth Amendment by failing to fulfill its obligations under the plea agreement after he had fully performed his part of the plea bargain, and (2) breached the IAD by securing a superseding indictment outside the time frame provided by that interstate compact.

In reference to the plea bargain, petitioner specifically asked the district court to decide whether (1) he was competent to withdraw from the plea agreement, (2) he was obligated by the plea agreement to enter the plea by a specific time, (3) the state had waived its objections to petitioner's failure to enter a plea by using his testimony at Salter's trial, and (4) the state had been prejudiced in any way by petitioner's equivocation about the plea agreement.

Petitioner's habeas petition was referred to a magistrate judge. The magistrate judge determined that petitioner could not invoke the district court's habeas jurisdiction on his plea agreement claims and that the IAD's provisions had not been violated. App. 38a-40a. Ignoring entirely the fact that petitioner's life had been threatened repeatedly as a result of his compliance with the plea agreement, the magistrate judge reasoned that petitioner's due process rights had not been prejudiced because he had not been denied his right to a fair trial. Accord-

ingly, the magistrate judge recommended that the state's motion to deny relief be granted and the petition be dismissed without addressing petitioner's plea agreement claims on the merits or considering his request for an evidentiary hearing. *Id.* at 39a n.4. The district court adopted the magistrate judge's findings and recommendation in a brief order. *Id.* at 27a-28a. Nonetheless, on May 19, 1992, the district court issued a certificate of probable cause under 28 U.S.C. § 2253 and petitioner appealed the dismissal of his habeas petition to the court of appeals.

A divided panel of the court of appeals affirmed, but on a basis different from the district court's jurisdictional holding. Without the benefit of a federal evidentiary hearing, the majority addressed the merits of what it incorrectly thought petitioner's argument "appear[ed] to be." App. 12a. The majority applied the "presumption of correctness," 28 U.S.C. § 2254(d), to the state court proceedings on the plea agreement, including the determination of petitioner's competency, App. 10a-11a, and made additional appellate findings based on the Restatement (Second) of Contracts, *id.* at 12a. It then concluded that the state court's determinations had been within the "broad bounds of reasonableness" required by this Court's decision in *Ricketts* v. *Adamson*, 483 U.S. 1 (1987). App. 12a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit, by slavishly abiding by the state court's competency assertion, has decided an issue of fundamental importance to criminal justice in direct conflict with the decisions of at least three other courts of appeals and decisions of this Court. While the basic historical facts underlying a state court's decision concerning an accused's mental competency are subject to deference on collateral review, a federal court exercising habeas jurisdiction in the Sixth, Tenth, and Eleventh Circuits is obligated to make certain that the state court has applied the constitutionally mandated legal standard of competency. The panel in this case consciously abdicated that responsibility. Accordingly, this case presents the Court with a perfect opportunity to clarify the Court's decisions that underlie the circuit split of authority as to the factual and legal nature of the competency determination.

Additionally, the Ninth Circuit's treatment of petitioner's habeas petition ignored the federal district court's fundamental obligation to review the properly presented claims of a state prisoner held in violation of the Constitution and of federal law in direct contravention of the decisions of this Court. While Congress and this Court have reformed the law of habeas corpus to protect the integrity of the writ, the decision of the Ninth Circuit renders the writ a total nullity by rubber-stamping the state court's decision and denying petitioner the opportunity to develop and present his claims in a federal forum as provided in 28 U.S.C. § 2254. Finally, the Ninth Circuit's determination that a superseding indictment tolled the speedy trial deadline of the IAD conflicts with the decisions of every other court to address the issue.

1. The Ninth Circuit's decision on mental competency in this case directly conflicts with the decisions of at least three other courts of appeals. It also conflicts with the proper interpretation of this Court's own decisions.

a. The Ninth Circuit relied on the fact that the state court had found petitioner competent. App. 10a-11a. In so doing, it followed the settled rule in that circuit that " '[a] finding on the issue of competence is a finding of fact.' " *Id.* (citing *Brewer* v. *Lewis*, 989 F.2d 1021, 1030 (9th Cir. 1993)). Relying on the language of 28 U.S.C. § 2254(d) indicating that issues of fact are entitled to a presumption of correctness, the court concluded that the state court's finding of competency must be presumed to be correct. *Id.* at 10a.

At least two other courts of appeals, however, directly have rejected such cursory treatment of the issue of competency as adequate to fulfill the federal court's obligations under habeas review. In *Price* v. *Wainwright*, 759 F.2d 1549 (11th Cir. 1985), the Eleventh Circuit held that "[t]he *ultimate* issue of competency has been treated as a mixed question of law and fact." *Id.* at 1551 (emphasis added). Likewise, the Sixth Circuit in *Levine* v. *Torvik*, 986 F.2d 1506 (6th Cir.), *cert. denied*, 113 S. Ct. 3001 (1993), held that "[a] number of courts have held that the question of mental competency is a mixed question of law and fact. We agree." *Id.* at 1514 (citations omitted).[2] A third court of appeals, the Tenth Cir-

---

[2] *See also Card* v. *Singletary*, 981 F.2d 481, 484 n.6 (11th Cir. 1992) ("[w]hether one is competent to stand trial under the Fourteenth Amendment is a mixed question of law and fact"), *cert. denied*, 114 S. Ct. 121 (1993); *James* v. *Singletary*, 957 F.2d 1562, 1574 n.18 (11th Cir. 1992) ("competency to stand trial constitutes a mixed question of law and fact"); *Crockett* v. *Noles*, No. 89-5924, 1990 U.S. App. LEXIS 9523, at *13 (6th Cir. June 12, 1990) ("[t]he issue of competency is a mixed question of law and fact"); *cf. Dixon* v. *Jacobs*, 427 F.2d 589, 595 n.17 (D.C. Cir. 1970) (habeas case noting mixed nature of competency issue and distinguishing questions of fact and law). *But see Spitzweiser-Wittgenstein* v. *Newton*, 978 F.2d 1195, 1197 (10th Cir. 1992) ("[c]ompetency is a question of fact"); *cf. Griffin* v. *Lockhart*, 935 F.2d 926, 930 (8th Cir. 1991) ("we generally presume that a state court's factual finding of competency is correct"); *Flugence* v. *Butler*, 848 F.2d 77, 79 (5th Cir. 1988) ("the factual finding of competence is presumed to be correct").

cuit, while treating the issue of competency as a factual matter, nonetheless reviews *de novo* the standard of competency applied by the state court. *Lafferty* v. *Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992). Thus, while the determination of historical events and the credibility of their chroniclers clearly is a factual matter, the ultimate determination of competency remains, in significant part, a legal issue subject to *de novo* review in at least three circuits.[3] This split in authority by itself warrants review by this Court.

b. The Ninth Circuit's decision also conflicts in principle with this Court's decision in *Dusky* v. *United States*, 362 U.S. 402 (1960) (per curiam). In *Dusky* this

---

[3] This Court's decisions are not to the contrary. In *Maggio* v. *Fulford*, 462 U.S. 111 (1983), this Court established that a state court's "*factual* conclusions" are subject to the presumption of correctness under 28 U.S.C. § 2254(d), when reviewed by a federal court exercising habeas jurisdiction. *Id.* at 117 (emphasis added). The court of appeals in *Maggio* had "substituted its own judgment as to the credibility of witnesses," *id.* at 113, and made its own factfindings on competency, rather than subjecting the habeas petitioner's claim to the more deferential evidentiary standard required by the statute. This Court specifically noted that the case did not involve any "dispute as to the proper legal standard to be applied" in determining competency. *Id.* at 116. Therefore, the application of the proper legal standard for competency is not a state court factfinding subject to the presumption of correctness.

In *Demosthenes* v. *Baal*, 495 U.S. 731 (1990), this Court addressed whether an inmate awaiting execution was competent when he waived his right to post-conviction relief. *Demosthenes* turned on the unremarkable general principle that "[a] state court's determinations on the merits of a *factual* issue are entitled to a presumption of correctness on federal habeas review." *Id.* at 735 (emphasis added). The *Demosthenes* Court divided over how to evaluate the "factual[ly]" "complex" evidence. *Id.* at 740 (Brennan, J., dissenting). No legal issues surrounding the competency determination were involved. Therefore, the Court was able to say that "a state court's conclusion regarding a defendant's competency" —in that case based on an exclusively "factual finding"—was "entitled to . . . a presumption [of correctness]." *Id.* at 735.

Court held that due process required an accused to possess (1) the "present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him." *Id.* at 402. This Court specifically held that it was insufficient to find an accused competent simply because he had a factual understanding of his surroundings and was "oriented to time and place." *Id.* (internal quotations omitted).[4] In short, this Court determined that there is a legal—indeed constitutional—component to the determination of competency.

Here, the Ninth Circuit concluded that the determination of competency was a finding of fact entitled to a presumption of correctness without ever determining whether the state court applied the constitutionally mandated standard for competency. The Ninth Circuit ignored the distinction between law and fact and expressly adopted the state court decision *in toto* as if that decision involved only factual considerations. To make a competency finding, however, the state court was required by the Constitution to apply—at a minimum—the *Dusky* standard. See *Godinez* v. *Moran*, 113 S. Ct. 2680, 2688 (1993).

The state court, however, simply determined that petitioner was able to "understand[] the nature of the proceedings" and "able to participate in his defense." Exh. 119 at 518-19. It never found petitioner able to under-

---

[4] This standard is equally applicable in habeas proceedings. *See, e.g., Godinez* v. *Moran*, 113 S. Ct. 2680 (1993). For decisions turning on the importance of a defendant's rational understanding in addition to a factual understanding, *see, e.g., Lafferty* v. *Cook*, 949 F.2d 1546, 1555 (10th Cir. 1991) (defendant "unable to make decisions on the basis of a realistic evaluation of his own best interests"), *cert. denied*, 112 S. Ct. 1942 (1992); *United States* v. *Hemsi*, 901 F.2d 293, 296 (2d Cir. 1990) (defendant's "impaired sense of reality prevented him from focusing on his legal needs and from acting effectively on his intellectual understanding").

stand rationally consultations with counsel or to have a rational understanding of the proceedings. Indeed, to the contrary, the court noted that petitioner had engaged in "bizarre behavior." *Id.* at 518; see also Order of June 4, 1984, App. 55a-56a. And, as noted above, the one physician who testified that petitioner was competent despite his mental defect, based his conclusion on petitioner's ability to recall past events and to follow court proceedings. Moreover, the evidence presented by the defense demonstrated that, regardless of whether petitioner factually could follow the proceedings, he certainly did not view them in a rational manner. See Exhs. 111, 112, App. 57a-62a.

The insufficiency of the trial court's finding is apparent from a comparison to the facts in *Dusky*. In *Dusky*, the examining physicians reported that the defendant was "oriented as to time, place, and person." 271 F.2d 385, 387 (8th Cir. 1959). The defendant understood the charges against him; he was in court, represented by attorneys; and he appreciated the consequences that could result from a conviction. *Id.* at 387-89. He was also able to give his attorney information about his past history. *Id.* at 389. Thus, Dusky would have satisfied the competency standard applied by the trial court in the instant case. However, because Dusky suffered from a mental defect and had auditory and visual hallucinations, was suspicious of those around him, and was depressed and fearful, even though on medication, *id.* at 387-89, this Court reversed Dusky's conviction based on the legally insufficient finding of competency. For precisely the same reasons, petitioner would not have been found competent under the *Dusky* standard. At a minimum, petitioner is entitled to an evidentiary hearing before the district court to fully explicate the merits of his claim of incompetence.

If this Court allows the Ninth Circuit's holding that the determination of competency is exclusively factual to stand, then state courts will no longer be subject to meaningful habeas review on the issue of the standard of

competency they apply. Instead, they will be free, as in this case, to disregard this Court's directives on the level of competency required by due process.

Allowing the Ninth Circuit decision to stand also will not diminish the federal courts' factfinding obligation. To the contrary, it will expand it. Under *Townsend* v. *Sain*, 372 U.S. 293 (1963), federal courts exercising habeas jurisdiction and determining whether to undertake evidentiary hearings must accept a petitioner's "*alleged* facts which, if proved, would entitle him to relief." *Id.* at 312 (emphasis added). Thus, a habeas petitioner alleging incompetence where there is no state court finding on the issue would obligate the federal court to accept *as fact* the mere allegation.[5] For all these reasons, this Court should review the decision of the Ninth Circuit to define and clarify explicitly the factual and legal nature of the determination of competency and resolve the conflict in the circuits embodied in the decision of the court of appeals below.

2. The decision of the Ninth Circuit to apply the "presumption of correctness" standard to petitioner's inchoate claims also is entirely inconsistent with the express guidance provided by this Court in *Keeney* v. *Tamayo-Reyes*, 112 S. Ct. 1715 (1992). The court of appeals, rather than discussing the district court's manifestly erroneous conclusion that it lacked habeas jurisdiction over petitioner's claims, proceeded to address the merits of petitioner's habeas petition in total disregard of the status of the petition and the arguments the parties raised before it. As a result, the court of appeals misapplied the presumption of correctness found in 28 U.S.C. § 2254(d), and deprived petitioner of the opportunity to present his habeas claim. In essence, the approach adopted by the Ninth Circuit ap-

---

[5] In circuits viewing competency as a mixed question of law and fact, this effect is avoided. *See Card*, 981 F.2d at 484 & n.6.

plies the wrong standard of review and reviews the wrong record.

In *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court provided that a federal court has the power to hold evidentiary hearings if a habeas petition makes allegations that, if proved, would entitle the petitioner to relief. *Id.* at 312. In addition, *Townsend requires* federal courts exercising habeas jurisdiction to hold evidentiary hearings in the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.[6]

28 U.S.C. § 2254(d), on the other hand, specifies the *burden of proof* to be borne by the petitioner in habeas proceedings. If the state court has conducted a hearing "evidenced by a written finding, written opinion, or other reliable and adequate written indicia," then its factfindings are entitled to a presumption of correctness that the

---

[6] The district court never addressed whether this Court's decision in *Townsend* required it to hold an evidentiary hearing. It is plain, however, that the district court would have been obliged to hold a hearing on the merits of petitioner's plea agreement claims. The merits of petitioner's claims were not resolved because the state court applied the incorrect legal standard for competency, regardless of whether competency itself is a mixed question of law and fact or is strictly factual. Even those courts of appeals that consider competency to be a factual matter permit federal evidentiary hearings on the application of the *Dusky* competency standard. *See, e.g., Lafferty*, 949 F.2d at 1549-50 & n.1.

petitioner must rebut *in a federal evidentiary hearing* by "convincing evidence." 28 U.S.C. § 2254(d). However, under certain circumstances, state factfindings are not entitled to a presumption of correctness. *Id.* § 2254(d)(1)-(7). Under these circumstances, the petitioner need only meet the "preponderance of the evidence" burden of proof to prevail. *Sumner* v. *Mata*, 449 U.S. 539, 550-51 (1981).

As this Court explained in *Keeney* v. *Tamayo-Reyes*:

> *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. *The two issues are distinct*, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

112 S. Ct. at 1270 n.5 (emphasis added).

The Ninth Circuit, however, ignored this distinction and fashioned an approach to dispose of petitioner's habeas request that deprived him of a meaningful opportunity to petition for habeas relief. The district court had done nothing more with petitioner's plea agreement claims than consider whether it had jurisdiction over them and had never afforded petitioner an opportunity to present any evidence.[7] The court of appeals then jumped to the conclusion that petitioner "ha[d] not presented evidence that he was incompetent at the time of the court's ruling sufficient to establish by convincing evidence that the state court's determination was erroneous." App. 10a. Not only did this approach deny petitioner the opportunity to present evidence, it also applied the heightened

---

[7] *See* Rule 8(a) and accompanying Advisory Committee Note of the Rules Governing Section 2254 Cases in the United States District Courts.

"convincing evidence" standard to petitioner's allegations as if a Section 2254(d) federal evidentiary hearing had occurred.

This Court has never sanctioned the denial of a hearing prescribed by *Townsend* on the ground that Section 2254(d)'s presumption of correctness applied to the factual findings of a state court. The decision of the Ninth Circuit conflicts with this Court's decisions construing these two very distinct determinations. Therefore, the Ninth Circuit's adoption of an approach for reviewing habeas petitions that misapplies the presumption of correctness warrants this Court's review so that habeas petitioners are not denied relief even before they are afforded the opportunity fully to present their claims to the district court.

3. The Ninth Circuit also interpreted the IAD in a way that is inconsistent with the interpretations of all other courts to address the issue by holding that the filing of a superseding indictment extends the time period specified by the IAD within which a state may try a prisoner held in custody pursuant to that Agreement. Because of the importance of this issue, and because there is a conflict among the circuits and various state courts on how it should be resolved, this issue, like the other ones presented in this petition, should be resolved by this Court.

The IAD is an interstate compact among 48 states and the federal government governing transfers of prisoners for trials in other jurisdictions. Article IV of the Agreement provides that where, as in this case, a prisoner is transferred upon the request of a state in which an "untried indictment" is pending, "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance." IAD art. IV(c), App. 4a. Article V of the Agreement further provides that "in the event that an action on the indictment . . . on the basis of which the detainer

has been lodged is not brought to trial within the period provided in . . . article IV of this agreement, the appropriate court . . . *shall enter an order dismissing the same with prejudice*." IAD art. V(c), App. 49a (emphasis added).

"Adoption of the [IAD] was motivated in part by a practice of filing detainers based on untried criminal charges that had little basis. . . . Even though unsubstantiated, the detainers would have a detrimental effect on the prisoner's treatment." *Carchman* v. *Nash*, 473 U.S. 716, 729-30 (1985). To remedy this problem, the Agreement simplified the mechanisms by which authorities in a charging state could obtain a prisoner for trial, but simultaneously imposed "important limitations . . . on prosecuting authorit[ies]," *United States* v. *Mauro*, 436 U.S. 340, 352 (1978), most notably the speedy trial requirement of Article IV. As this Court has made clear, that requirement must be strictly enforced, otherwise "the Government [could] gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action." *Id.* at 364. See also *Stroble* v. *Anderson*, 587 F.2d 830, 838 (6th Cir. 1978) (IAD "cannot appropriately be turned from a shield for the defendant into a sword for the prosecution").

In this case, it is undisputed that petitioner was not even properly *indicted* within the time period specified in Article IV(c). App. 14a. The state secured his presence in Oregon pursuant to an indictment that it knew was patently unconstitutional under Oregon law, because the prosecutor had excused one of the seven grand jurors constitutionally required to return a valid indictment. *Id.* In response to petitioner's successful motion to quash, and recognizing that the time period within which to try petitioner was about to expire, the state, over objection, sought and received a 30-day "good cause" ex-

tension within which to secure a proper indictment.[8] The only "good cause" the state claimed was that it needed "to resubmit [the] matter to the grand jury." Exh. 113 at 52. Petitioner ultimately was convicted on the basis of that indictment. The Ninth Circuit, on *de novo* review, found that Oregon had established the requisite "good cause" and thus that the 30-day extension had been properly granted. App. 16a.

The Ninth Circuit's decision is the first to hold that a superseding indictment can, through any mechanism, toll the IAD's speedy trial deadline. It is entirely inconsistent with both the terms and expressed purposes of the Agreement. See, *e.g.*, IAD art. I, App. 43a-44a ("the purpose of this agreement [is] to encourage the expeditious and orderly disposition of [outstanding] charges"); *Fex* v. *Michigan*, 113 S. Ct. 1085, 1092 (1993) (Blackmun, J., dissenting) ("The IAD's primary purpose is not to protect prosecutors, or even to protect prosecutions, but to provide a swift and certain means for resolving the uncertainties and alleviating the disabilities created by outstanding detainers"). If allowed to stand, the decision below will permit states within the Ninth Circuit to violate their contractual obligations to their sister states, as well as the statutory rights of prisoners, merely by dismissing the indictment under which the prisoner was obtained and seeking an extension of time within which to secure another indictment. They will be able to do so even where, as here, they have full knowledge, *ab initio*, that the original indictment is entirely deficient. Because the Ninth Circuit's holding so radically misinterprets the IAD, it is in conflict with a decision of the Second Circuit, as well as the decisions of both of the state courts to address the

---

[8] Petitioner not only objected to the state's motion for a "good cause" extension, but also filed a motion to compel his return to Washington and a motion to dismiss the indictment on which he ultimately was convicted with prejudice because it was untimely. Both of those motions were denied. Appellant's Brief before 9th Circuit at 28 (filed Sept. 23, 1992).

issue. Those courts have held that a new indictment does *not* extend the time period within which a prisoner must be tried under the IAD. The decision also conflicts with the decisions of two courts of appeals and the Supreme Court of Colorado holding that similar delays do not provide grounds for "good cause" extensions of time.

a. The Ninth Circuit's decision conflicts with decisions of the Second Circuit and courts in New Mexico and New York holding that a superseding indictment or other instrument does not extend the IAD's time limits. In *United States* v. *Cephas*, 937 F.2d 816, 821 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992), the Second Circuit flatly rejected the Government's contention that the "detainer clock automatically stopped ticking" when the original charges against a prisoner were dismissed, and held that "the government cannot lodge a detainer against the defendant and then throw out the clock every time it dismisses charges, only to start the clock anew by bringing a new set of charges."

Likewise, in *People* v. *C'Allah*, 474 N.Y.S.2d 305, 306 (N.Y. App. Div. 1984), the Supreme Court of New York permitted a prisoner who was not brought to trial within the specified time period to withdraw a guilty plea, holding that "[t]he People may not avoid operation of the time limitations prescribed in [the IAD] simply by the expedient of procuring another indictment, whether it arises out of the discovery of new evidence or otherwise." And in *New Mexico* v. *Shaw*, 651 P.2d 115, 118 (N.M. Ct. App. 1982), the court "decline[d] to subvert the unmistakable meaning of the various provisions of the Agreement by holding that a second indictment . . . can avoid the time restrictions" of the IAD. Indeed, the court held that "[t]o espouse a view that . . . reindictment begins [the time period] over again, would make a farce of the entire design and objectives of the Agreement." *Id.* at 119. The Ninth Circuit's decision that the need to secure a superseding indictment constituted "good cause" for tolling peti-

tioner's right to a speedy trial under Article IV simply cannot be squared with these decisions.

b. The Ninth Circuit's decision also conflicts with the decisions of the Second and Fifth Circuits and a number of state courts holding that delays occasioned by administrative snafus do not constitute "good cause" sufficient to toll the IAD's deadlines. In *Birdwell* v. *Skeen*, 983 F.2d 1332, 1340 (5th Cir. 1993), the court held that "[a] continuance which is granted to allow a party to ascertain whether testimony is necessary for a . . . hearing is not based upon good cause when the party requesting the continuance could have made that determination prior to the hearing by using reasonable diligence." Likewise, in *United States* v. *Ford*, 550 F.2d 732, 743 (2d Cir. 1977), the court held that a crowded court docket did not constitute " 'good cause' " for delay. And in *People* v. *Allen*, 744 P.2d 73, 77 (Colo. 1987), the Supreme Court of Colorado, reasoning that "[t]he burden of satisfying the speedy trial requirements of the IAD [is] on the prosecutor and the trial court," and that "the purpose of the Agreement requires that the adverse consequences of official oversights be visited upon the prosecution, not upon the prisoner," dismissed the charges against a prisoner with prejudice where the state exceeded the 120-day time limit through an administrative mix-up. These cases stand squarely for the proposition that even legitimate administrative problems do not constitute good cause for delay, and cannot be reconciled with the Ninth Circuit's holding that the need to secure a superseding indictment, occasioned by the bad faith of the prosecutor in securing the original indictment, provides a sound basis for delay.

Accordingly, the decision below raises two separate conflicts among the lower courts with respect to the proper interpretation and application of the IAD. This inconsistency in the approach to a fundamental law regulating the treatment of prisoners warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

June 9, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-35471

ROBERT HADEN KING, JR.,
Petitioner-Appellant,

v.

NEIL BROWN,
Superintendent, Clallam Bay Corrections Center,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted May 3, 1993

Decided Nov. 3, 1993

Phillip M. Margolin, Margolin & Margolin, Portland, OR, for petitioner-appellant.

Robert M. Atkinson, and Robert B. Rocklin, Asst. Attys. Gen., Salem, OR, for respondent-appellee.

Michael E. Rose, American Civil Liberties Union, Portland, OR, for amicus.

Before: PREGERSON, KLEINFELD, Circuit Judges, and LEGGE, District Judge.*

KLEINFELD, Circuit Judge:

King was convicted in Oregon state court of "aggravated murder" and sentenced to life imprisonment with a minimum of thirty years to serve. The main issue on appeal is whether the State of Oregon was bound to a ten year minimum on a plea to ordinary murder because of a plea bargain it made with King. King also claims that his prosecution violated the Interstate Agreement on Detainers because the State of Oregon secured his release from the State of Washington with an invalid indictment. The district court dismissed King's petition for habeas corpus relief. We affirm.

I. Facts

A man named James Salter allegedly hired King to find a hit man to kill Salter's ex-wife Julie. The hit man, Hill, killed Mrs. Salter pursuant to King's arrangement. King and Hill were convicted, in separate trials, but Salter was acquitted.

King was initially indicted on March 5, 1982, while he was in the custody of the State of Washington. He was transferred to Oregon pursuant to the Interstate Agreement on Detainers. The State of Oregon took custody of King on November 20, 1982. With extensions agreed to by King, the State of Oregon initially had until April 18, 1993 to try King under the indictment. O.R.S. 135.-775, art. IV(c).

On April 11, 1983, King filed a motion to quash the March 5 indictment, asserting that the indictment was improperly obtained under the Article VII § 5(2) of the Oregon Constitution. This provision requires that a grand

---

* The Honorable Charles A. Legge, United States District Judge for the Northern District of California, sitting by designation.

jury consist of seven jurors, five of whom must agree to indict. The grand jury initially did consist of seven jurors, but the prosecutor excused one of the seven. The other six unanimously indicted. The Oregon trial court granted King's motion to quash the indictment, holding that there was no "good cause" for excusing the juror.

On April 12, 1983, the state filed a motion for a thirty day continuance to allow for resubmission to the grand jury. The trial court found "good cause" for the continuance, and gave the state until May 15, 1983 to file a new indictment. The court also denied King's motion to compel his return to the State of Washington.

On April 18, 1983, the state filed a second indictment. King was arraigned on the following day, and he filed a motion to dismiss for failure to try him within the time allowed under the Interstate Agreement on Detainers. The motion was denied.

King also objected to the state's second indictment on the ground that there was a substantial change in theory from the first indictment. On April 19, 1983, the prosecutor resubmitted the indictment on the original theory, and a third indictment was returned immediately. King's motion to quash or set aside this indictment was denied.

On August 3, 1983, King entered into a plea agreement with the State of Oregon. The agreement provides for ten year eligibility for parole in exchange for a guilty plea to murder, information, and testimony:

. . . . .

> (2) The trial presently set for August 8, 1983 will be continued at the defendant's request. . . .
>
> (3) The defendant will consent to be interviewed by officers of the state or their agents in the presence of defendant's counsel concerning all facts he knows about the death of Julie Ann Salter on September 23, 1980. The officers of the state or their agents will investigate those facts and present the results of

the investigation to the state. The state will evaluate those facts on the issue of whether or not they provide independent corroboration of the defendant's representation that James Salter agreed to pay him money and things of value to arrange for the death of Julie Ann Salter.

(4) If the State concludes that said information, in conjunction with information otherwise known to the state, does provide said independent corroboration, then and in that event the state will allow the defendant to enter a plea of guilty to the charge of murder with the understanding that the defendant will receive a life sentence with an order that he serve a minimum of ten years before being eligible for parole, and that said sentence will run concurrent to any sentence the defendant is now serving.

. . . . .

(6) It is further agreed by the defendant that if such plea should be entered, that the state will seek a presentence investigation and the defendant will testify truthfully in any trial against any other person who may be indicted in the future for any crime connected with the death of Julie Ann Salter.

. . . . .

(8) Should the defendant refuse to cooperate or give information requested pursuant to this agreement, or should the state conclude under the terms of this agreement that the information does not provide independent corroboration, the parties agree that no evidence resulting from this agreement, whether that evidence is information, persons, names, documents or physical exhibits, will be introduced by the state against the defendant in any trial or hearing unless the state can establish that it was already aware of that information.

. . . . .

King provided information to police and testified at the grand jury and bail hearings of James Salter.

Then King demanded something more from the state, in addition to the ten year eligibility for parole and delay of his trial for which he had bargained. He insisted that the State of Oregon agree to facilitate his transfer to a prison in his home state of Alabama, and threatened to stop taking his medication so that he would relapse into his preexisting mental illness if the state did not acquiesce. Exh. 119, at 516-R-T. The state refused to grant King's additional requests and he stopped taking his medication. *Id.*

On February 24, 1984, King sent a handwritten motion to the court to obtain a trial date and dismiss counsel. In the motion he stated that he "withdraws in full . . . from all life endangering plea-negotiations that exist at present."[1] Appellant's brief, at A-4. In response, the trial court held a hearing, during which King's counsel questioned King's competence to decide whether to proceed pro se. The court ordered an examination by Dr. Parvaresh, who opined that King was not competent at that time, but if he began taking his medication, his competence should be reevaluated in seven to ten days. The court ordered additional examinations.

In April 1984, King testified at the trial of James Salter, as agreed under the terms of the plea agreement. On May 31, 1984, the trial court held a hearing to determine whether King was competent to assist his own defense. Evidence was presented by both sides regarding King's psychological fitness, and the trial court found that King "understands the nature of the proceedings and that he is able to assist and co-operate with counsel and is able to participate in his defense." Exh. 119, at 518-19. There was testimony that King had studied psychology and completed law school, and that he would feign

[1] King apparently considered his agreement "life endangering" because he allegedly had been receiving death threats from other prisoners for agreeing to testify against Salter. These alleged threats contributed to his desire for a transfer to Alabama.

mental illness to manipulate the proceedings in his case. King's counsel advised the court that King had gone back on his medication and was able to understand the proceedings and assist counsel, so he did not wish to call witnesses and requested that the court make its ruling based upon the medical reports. King would not speak in court so that the court could make an independent judgment, so the state, concerned about the adequacy of the record, called medical witnesses anyway, and King's attorney cross-examined. The court ruled that King was competent to stand trial, and that ruling is not challenged in this appeal.

Then the court asked counsel if a trial date should be set. King, through counsel, advised the court that a trial date should be set, and that King was withdrawing his motion to proceed pro se:

> MR. LYONS [King's counsel]: Your Honor, I have discussed this with Mr. King. Again he does not wish, for whatever reasons may be, to make any representations to the Court. But he has authorized me to do so. And *we are prepared to set a trial date in this case.*
>
> I would point out to the Court that Mr. King tacitly is withdrawing his motion to proceed pro se, which puts me back in the position of being his attorney at this time.
>
> . . . . .
>
> . . . I could be prepared for trial by the middle of August. . . .
>
> THE COURT: What is your reaction?
>
> MR. MILLER [Deputy District Attorney]: I'm going to let Mr. Eglitis address the trial, scheduling the trial. My reaction, I would like to mention to the Court, is that the defendant has entered a plea of not guilty to this charge of Aggravated Murder. Under our agreement that we have entered into with

the defendant, we have offered him an opportunity, pursuant to our agreement, to plead guilty to the charge of Murder with certain understandings. *It's my understanding that by asking for a trial date at this time he is seeking to withdraw that plea agreement.* And if that is the case, we want that understood right now.

THE COURT: Well, I would think, Mr. Miller, you better file a formal motion to that effect . . . because the plea agreement that I approved is in the file, is it not?

MR. MILLER: Yes.

THE COURT: And I think some disposition has to be made of that. *So if I were you, I would file a formal motion to not be bound by the plea agreement, that it be held for naught, no force and effect.*

MR. MILLER: All right.

THE COURT: The record then would stand that he has a not guilty plea to the charge of Aggravated Murder.

Id. at 519-21 (emphasis added).

King's attorney did not contradict the government's "understanding that by asking for a trial date at this time he is seeking to withdraw that plea agreement." He proceeded instead to request co-counsel for the trial.

The state then filed a motion for the court to enter a finding that King rescinded the plea agreement. A hearing was held on July 9, 1984. One of King's attorneys explained that "we are still trying to work out the custody arrangement to the State of Alabama. I feel that may have some bearing on what Mr. King decides to do here." He requested more time to work on getting "a commitment out of, at least, the Alabama Parole Board," so that after Alabama committed itself, King could "make an intelligent decision as to whether he

wants to pursue the plea agreement or go to trial." The state's attorney responded by explaining its need to know whether King was going to plead guilty or not, because expensive trial preparation needed to begin if he would not. The State was at that time still willing to abide by the terms of the plea agreement:

> . . . today is the 9th of July. The State would like to know for certain, we would like to start preparing for trial. And even the preparations for trial are exceedingly expensive. As the court may know, this case involves largely out-of-state witnesses. It's a lengthy and expensive procedure to procure their attendance and we would like not to have to wait until any longer to begin that. We, of course, would like not to begin it if, in fact, we know that Mr. King is going to enter his plea of guilty and follow the plea agreement.

The judge, noticing the offer to proceed according to the plea agreement, asked for clarification from the state of its position, obtained it, and entered a finding that the state was no longer bound by the plea agreement:

> THE COURT: Do you think you are still bound by the plea agreement and will go through with it after was has happened?
>
> MR. EGLITIS [Deputy District Attorney]: Well, we are not, Your Honor. But I believe the option of that would then be with us. *Mr. King has indicated to this Court that he wants a trial date, that he doesn't want to have anything to do with the plea agreement and would like the Court to enter the order to that effect.* That would in essence leave the option with the State rather than with Mr. King.
>
> THE COURT: Do you want to add something else, Mr. Lyons?
>
> MR. LYONS: *No, Your Honor, I have nothing further to add at this time.*

Id. at 526 (emphasis added). The court then issued an order "relieving the State from any obligation that was originally involved in the plea agreement." *Id.* at 526-27. King's trial was scheduled to begin on August 20, 1984.

A month later, twelve days before trial, King filed a motion to compel specific performance of the plea agreement. He argued that he had substantially complied with his obligations under the agreement, so the state should accept a plea to the lesser charge of murder, rather than aggravated murder as charged, and he should receive the sentence originally agreed upon. At a hearing on the motion, King's attorney acknowledged that King had, after testifying against Salter, advised the court that he wanted to go to trial rather than proceed with the plea agreement, but claimed that at the time, King had not been taking his medication. The state's attorney pointed out that trial had now been delayed a year, four witnesses had disappeared, and the witnesses who would testify would have another year added to the time for memory to fade, and also pointed out King's apparent competence since the time the court had made the competency determination.

The trial judge denied King's motion, stating "I think it's mainly whether or not the State has been prejudiced by the failure of the defendant to follow the plea agreement, and I find they have been." *Id.* at 537. He noted the delay, the need to try to locate the witnesses again, and that this was the second or third time the state had to prepare the case for trial. The judge specifically found that King made an informed decision and knew what he was doing when he withdrew from the plea agreement. *Id.* at 538-39.

King was convicted at a jury trial of aggravated murder, and sentenced to life imprisonment, with a thirty year mandatory minimum.

King appealed, and exhausted his remedies in state court. *See State v. King,* 84 Or.App. 165, 733 P.2d 472, *rev. denied,* 303 Or. 455, 737 P.2d 1248 (1987). He then filed for habeas relief in federal court pursuant to 28 U.S.C. § 2254. He alleged, inter alia, that the state court prosecution should have been barred by the Interstate Agreement on Detainers and that the State of Oregon violated its obligations under the plea agreement. These two issues are the subject of this appeal.

II. The Plea Agreement.

We review de novo the district court's denial of habeas relief. *Adams v. Peterson,* 968 F.2d 835, 843 (9th Cir. 1992) (en banc), *cert. denied,* —— U.S. ——, 113 S.Ct. 1818, 123 L.Ed.2d 448 (1993). We review the district court's factual findings for clear error, and state court findings of fact are entitled to a presumption of correctness.[2] *Brown v. Burns,* 996 F.2d 219, 220 (9th Cir.1993); 28 U.S.C. § 2254(d) (presumption of correctness). To overcome the presumption of correctness, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d).

The state court specifically held that King was competent when he rescinded the plea agreement. *See King,* 733 P.2d at 479. "A finding on the issue of competence is a finding of fact," and thus is presumed correct. *Brewer v. Lewis,* 989 F.2d 1021, 1030 (9th Cir.1993). King has not presented evidence that he was incompetent at the time of the court's ruling sufficient to establish by convincing evidence that the state court's determination was erroneous. At the hearing to determine competency, both sides presented substantial evidence to support their

---

[2] There are exceptions to the presumption of correctness, 28 U.S.C. § 2254(d)(1)-(8), but none apply here, where King was given full and fair hearings on the issues of his competence and the rescission of the plea agreement.

positions. The state court's conclusion that King was competent is supported by the record, and is thus entitled to deference.

The state court also found that King rescinded the plea agreement by requesting a trial date and by failing to comply with the plea agreement. The Court of Appeals of Oregon stated that this "finding is supported by the evidence in the record and we are bound by it." *King*, 733 P.2d at 479.

The agreement required three acts by King, and one by the State of Oregon. King would (1) provide information, (2) testify, and (3) plead guilty to murder. The state would accept the plea to murder, rather than aggravated murder, and agree to a ten year mandatory minimum before eligibility for parole and a sentence concurrent with King's Washington sentence. This was a bilateral contract, in which the state promised to do one thing, if King did three. King did two, then announced his intention not to proceed further. The state changed its position in reliance on King's announced intention to go to trial. King had repeated opportunities to correct the state's misunderstanding, if it was a misunderstanding, that he would go to trial, not plead guilty. There was no misunderstanding, though, and King claims none. He just wanted something more than he had bargained for, incarceration in his home state of Alabama, instead of in Oregon.

In *United States v. Osif*, 789 F.2d 1404 (9th Cir. 1986), we explained "a defendant does not have a constitutional right to a plea bargain, . . . nor, when he rejects a plea, can he later object to the government's decision to proceed to trial on the counts originally charged." *Id.* at 1405. Here, King rescinded the plea agreement, and thus it was no longer in force or available for him to accept. "The government is under no obligation to reoffer an agreement that was previously rejected. . . ." *Id.* Although King did not initially reject the

government's offer of the plea agreement, he withdrew his acceptance. Thus, the government had no obligation to reoffer the original plea agreement.

"The construction of a plea agreement in a state prosecution and the concomitant obligations flowing from it are, within broad bounds of reasonableness, matters of state law." *Ricketts v. Adamson,* 483 U.S. 1, 6 n. 3, 107 S.Ct. 2680, 2684 n. 3, 97 L.Ed.2d 1 (1987). "Once a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas corpus court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second-guessing the effect of the breach and is not a license to substitute a federal interpretation of the terms of the plea agreement for a reasonable state interpretation." *Id.*

The state court decided that King had rescinded his agreement, and that the state had been prejudiced by his failure to abide by the agreement, so he was not entitled to specific performance. *King,* 733 P.2d at 479. The factual findings of intentional rescission, competence, and prejudice to the state, are entitled to the presumption of correctness. The determination falls well within the "broad bounds of reasonableness." King has not suggested that any constitutional right was violated by this determination. His argument appears to be that the state court determination fell outside the "broad bounds of reasonableness," because King had performed so much of his agreement that it violated his right to due process of law not to command specific performance against the state.

We reject the proposition that the Oregon state determination fell outside the "broad bounds of reasonableness." King partially performed his agreement, by giving information and testifying, but then repudiated it. *See* Restatement (Second) Contracts § 250 (1981). He said

he would not plead guilty unless he got more than he had bargained for—he wanted Alabama incarceration, in addition to ten year parole eligibility and concurrent sentences. His repudiation was not a casual remark taken advantage of by a prosecutor eager to escape performance—he was brought into court, with counsel, and the matter was carefully reviewed in a context which gave King an opportunity to clarify his intention to adhere to the plea bargain, had that been his intention. King's repudiation of his agreement excused the government's failure to perform its part of the bargain. *Id.* § 253(2). A few days before trial, King offered to perform the agreement he had repudiated, that is, to nullify his repudiation. *Id.* § 256. But the judge reasonably ruled that he did not have the power to impose on the government the contract he had repudiated. The July 9, 1984 hearing in open court established that the repudiation was understood by both parties as final, so King had no power subsequently to nullify it and take advantage of the repudiated agreement. *Id.* § 256(2). Also, the trial judge found that the government had materially changed its position in reliance on the repudiation, by engaging in expensive and burdensome pretrial preparation. *Id.*

Since the state court construction fell within "the broad bounds of reasonableness," we cannot engage in "second guessing the finding of breach" or substitute an independent federal interpretation which would treat King as having not breached, or as entitled to specific performance despite his breach. *Ricketts,* 483 U.S. at 6 n. 3, 107 S.Ct. at 2684 n. 3. The matter is not so hypertechnical as this explanation may sound. King and his attorney sat silently as the state in open court attempted to clarify the status of his intentions. The state trial judge reasonably prevented him from sandbagging the state with yet another change of position on the eve of yet another trial date. King made his decision, to repudiate his agreement, and was reasonably and fairly held to it.

III. Interstate Agreement on Detainers.

King claims that his prosecution by the State of Oregon was barred by the Interstate Agreement on Detainers, codified at O.R.S. § 135.775 et seq. We have jurisdiction because of the Congressional approval of the compact, *see* 18 U.S.C. app. § 2 (1982), and review de novo. *Snyder v. Sumner,* 960 F.2d 1448, 1452 (9th Cir.1992) (citations omitted).

The State of Oregon indicted King on March 5, 1982, while he was in the custody of the State of Washington. Pursuant to the Interstate Agreement on Detainers, Oregon obtained custody of King on November 20, 1982. With a twenty-nine day extension agreed to by King, in addition to the 120 days provided for under O.R.S. 135.775, art. IV(c), Oregon had until April 18, 1983 to try King. On April 11, 1983, King filed a motion to quash the March 5 indictment on the ground that it was returned by a grand jury consisting of only six members, rather than seven, as required under the Oregon Constitution.[3] The trial court granted King's motion and quashed the indictment.

On April 12, 1983, the prosecution filed a motion for a thirty day continuance to allow time to resubmit the case to a grand jury. The trial court found that "good cause" existed for the continuance, so it granted the state's motion. King challenges this ruling.

In his petition for writ of habeas corpus, King asserted that his "prosecution was barred under the speedy trial provisions of the Interstate Agreement on Detainers" on the ground that "the State's motion to postpone trial for an additional 30 days was granted improperly." CR 1, at 6. His argument conceded that good cause would excuse the delay, but claimed that there was no good cause:

---

[3] Initially, the grand jury consisted of seven members, but the prosecutor excused one of the jurors.

> If the court was correct in concluding that the state showed good cause when it requested a 30 day continuance to obtain a new indictment, then the 120 day period would have been tolled for 30 more days and petitioner's position that the 120 day speedy trial requirement of the IAD had been violated would be incorrect.
>
> . . . . .
>
> The question presented to this Court is whether a state, which obtains a defendant from another state through the use of an invalid indictment, can establish good cause for a continuance under the IAD when the defendant successfully moves to dismiss the invalid indictment and the basis for the state's continuance is the convening of a grand jury to obtain a new, valid indictment against the defendant.

CR 41, at 40-41.

The district court adopted the findings and recommendations of the magistrate judge, that there was good cause:

> In light of the timely nature of the State's request, and considering the nature of the request, I agree with the Oregon Court of Appeals' holding in this case that the trial court did not err in granting a continuance for good cause shown. In light of the previous indictment returned by the grand jury, a continuance to resubmit the charges to the grand jury was both reasonable and necessary.

ER 10.[4]

---

[4] The magistrate judge correctly noted that the only issue King raised was "whether a trial court has the discretion to grant a continuance, upon a timely motion by the State, to permit the State to resubmit the case to the grand jury under the circumstances presented here." ER 11. To the extent that King raises additional issues relating to the Interstate Agreement on Detainers, we will not address them for the first time on appeal. *See United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir.1991).

In rejecting this argument by King, the Oregon Court of Appeals reasoned as follows:

> Defendant argues that there is a contradiction in the trial court's rulings because, in dismissing the first indictment, the court found that there was not good cause for excusing one grand juror but, when the state requested a continuance, the court found good cause to continue. We see no contradiction. Although the prosecutor lacked good cause to excuse the juror, it does not follow that, when defendant's motion to quash was made just six days before his speedy trial period would expire, the state lacked good cause to seek a continuance to resubmit the case to the grand jury. The trial court did not err in denying defendant's motion.

King, 84 Or.App. at 170, 733 P.2d at 476. The Court of Appeals of Oregon has it exactly right. The unanimous indictment was technically defective, but King did not move to dismiss until the end of the time period, so the state had good cause for a thirty day continuance to take the case to a grand jury for another indictment.

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

Because the State of Oregon failed to honor its obligations to King under the terms of a plea agreement, I dissent from the majority opinion. I believe that the district court erred in finding that King's due process rights were not violated.

BACKGROUND

On April 19, 1983, King was indicted for the aggravated murder and murder of Julie Salter in Clackamas County, Oregon. On August 3, 1983, King and the State of Oregon ("the state") entered into a plea agreement, which was accepted by the court. Under the terms of the agreement:

1. King agreed to provide information to the state concerning the involvement of co-defendant James Salter in the murder of Salter's ex-wife, Julie. King also agreed to testify for the state at any bail hearings, grand jury proceedings, and trials in the James Salter prosecution.

2. In exchange for King's cooperation, the state agreed to "allow [King] to enter a plea of guilty to the charge of murder with the understanding that [King would] receive a life sentence with an order that he serve a minimum of ten years before being eligible for parole, and that said sentence will run concurrent to any sentence the defendant is now serving." [1]

The plea agreement did not set a deadline for King to enter a guilty plea. The agreement further provided that if King refused to cooperate, "no evidence resulting from th[e] agreement, whether that evidence is information, persons, names, documents or physical exhibits, [would] be introduced by the state against [King] in any trial or hearing unless the state can establish that it was already aware of that information."

On December 6, 1983, King testified at Salter's grand jury proceedings in accordance with the plea agreement. On December 7, 1983, King's counsel told the court that King wished to enter his guilty plea in the middle of the following week. On December 14, 1983, the state and King agreed to continue the entry of his plea to a future date, as long as King entered such plea *before* the Salter trial.[2]

---

[1] King was already serving two consecutive sentences, each with a twenty year minimum, in Washington state prison.

[2] On this issue, the following exchange occurred:

THE COURT: What is the purpose of delaying the entry of that plea?

THE DISTRICT ATTORNEY: Your Honor, this we have been informed Mr. King wishes. We examined the relative benefits and detriments that might result in a trial of Mr. Salter and it's our opinion it is of no detriment to us as long

King continued to fulfill his obligation under the plea agreement. In addition to testifying before the grand jury, King spoke with the Oregon police about Salter's involvement in Julie Salter's murder and testified at Salter's bail hearing in January 1984.

In December 1983, King began receiving serious death threats from other prisoners because of his agreement to testify against Salter. As a result, Oregon State prison authorities implemented extraordinary security provisions to ensure King's safety.[3] In addition, King's counsel undertook efforts to arrange for King's transfer to state prison in Alabama, King's home state.

On February 23, 1984, King filed a handwritten motion asking the court to discharge his attorneys so he could proceed pro se. In addition, he asked the court to set a trial date and accused his attorneys of placing his life in jeopardy because of their plea negotiations. Accordingly, he asked the court to permit him to withdraw from "all life endangering plea agreements."

On February 24, King asked the court to permit him to proceed pro se. King stated to the court that he no

---

as the plea is entered before Mr. King testifies, or probably more specifically before the Salter trial starts.

THE COURT: What if he changes his mind?

THE DISTRICT ATTORNEY: Prior to the testimony?

THE COURT: Yes.

THE DISTRICT ATTORNEY: In that sense, Your Honor, there would be a breach of the agreement and we would proceed as if the agreement was null and void. In other words, we would go ahead and prosecute Mr. King for the charge of aggravated murder.

[3] Affidavits from prison officials indicated that King's cell was fitted with bullet-proof plates of armor and King was put in a bullet-proof vest and disguised whenever he was taken from his cell. Indeed, the prison authorities stated that the security precautions for King were the most extreme they had ever seen. In fact, despite such precautions, a fellow prisoner still managed to stab King in the eye with a pencil after calling him a "snitch."

longer wished to enter a guilty plea as allowed under the plea agreement because the state refused to guarantee him a transfer to Alabama as requested by him for security reasons.

As a result of King's motions, one of King's two attorneys told the court that King was not competent to represent himself and moved to withdraw. On February 27, 1984, King's second attorney advised the court that King was not competent to stand trial because he was mentally ill and had stopped taking his medication, which included daily does of Tegretol, Dilantin, Haldol, Lithium, and Benadryl.[4] In response, the court ordered Dr. Parvaresh, a psychiatrist, to conduct an examination to determine King's competency to stand trial.

On March 3, 1984, the state also moved for a competency examination of King and requested that the examination be conducted at the Oregon State Hospital. On March 9, 1984, Dr. Parvaresh submitted his written opinion, which concluded that King "is not competent to stand trial as he is clearly mentally too impaired to assist in his own defense." On April 9, 1984, Dr. Jerry K. Larsen, a second phychiatrist, gave a similar opinion. The court held no hearing concerning King's mental competency until the end of May 1984.

In April 1984, Salter's murder trial began. At the trial, King fulfilled another part of his plea agreement obligations by testifying against Salter for three days. Despite the state's previous assertion at the December 14, 1983 hearing that it wanted King to enter his guilty plea *before* testifying at the Salter trial, the state did *not* require King to enter a guilty plea before testifying. On May 10, 1984, Salter was acquitted.

---

[4] King has suffered from mental illness since he sustained head injuries in an aircraft accident in January 1979. As a result, he experienced memory loss and has since required hospitalization and medication to control grand mal seizures.

On May 17, 1984, King's counsel reminded the court that it had not yet ruled on King's competency to stand trial and to proceed pro se. The court had postponed the competency hearing to allow King to tesify at the Salter trial.

On May 31, 1984, the court held a competency hearing. The court determined that, although King suffers from a "mental defect," he was nonetheless able to assist in his own defense. Hence, the court determined that King was competent to stand trial. King refused to address the court but through his counsel withdrew his motion to proceed pro se.

In addition, at the May 31 hearing, King's counsel told the court that King had asked that a trial date be set. In response, the prosecutor took the position that, by requesting a trial date, the state assumed that King was seeking to withdraw from the plea agreement. The court told the state to file a formal motion for rescission. On June 5, 1984, the state filed a motion asking the court to find that King had rescinded the plea agreement.

On July 9, 1984, King's counsel asked the court for additional time before ruling on the state's request to terminate the plea agreement. In the interim, King's counsel wished to see if he could secure a commitment from Alabama for King's transfer to Alabama state custody. King's counsel informed the court that he had prepared a 700-page presentation for the Alabama Parole Board, and was still trying to arrange the transfer. King's counsel further informed the court that a commitment from Alabama would permit King to "make an intelligent decision as to whether he wants to pursue the plea agreement or go to trial."

In response, the prosecutor argued that the state did not want to undertake extensive trial preparations if King were ultimately going to plead guilty. The prosecutor again asserted that, by asking for a trial date, King had

withdrawn from the plea agreement. King's counsel remained silent. The trial court then issued an order terminating the plea agreement. In so ruling, the court simply stated "[t]hat the defendant has breached and rescinded the plea agreement entered into between the defendant and the State of Oregon." *State v. King,* 84 Or. App. 165, 175, 733 P.2d 472, *rev. denied,* 303 Or. 455, 737 P.2d 1248 (1987) (citing trial court transcript).

On August 8, 1984, twelve days before his trial was scheduled to begin, King filed a motion expressing his desire to plead guilty and asking the court to compel specific performance of the plea agreement. The state opposed King's motion, alleging that it had been prejudiced because of the cost and inconvenience of having to prepare for trial.

On August 15, 1984, the court held a hearing on King's motion to compel specific performance of the plea agreement. At the hearing, King's counsel pointed out that King had fully complied with his duties under the plea agreement by cooperating with the state in Salter's prosecution and by testifying against Salter for three days. In addition, King's counsel reminded the court that, in reliance on the plea agreement, King had relinquished substantial rights, such as the right to a speedy trial, the right to remain silent, and the right not to incriminate himself. Accordingly, counsel argued that fundamental fairness as required by the Fourteenth Amendment's Due Process Clause mandated that King receive the benefit of his plea bargain. King's counsel also told the court that he did not believe King was competent to make an informed and rational decision about entering a plea when he earlier asked for a trial date.

The trial court found that King's request for a trial date had prejudiced the state. Hence, the court denied the motion to compel specific performance of the plea agreement.

Thereafter, King was tried and convicted by a jury for aggravated murder in violation of O.R.S. 163.095(1). The trial court sentenced him to life imprisonment with thirty years' mandatory minimum. The court further ordered this sentence to be served consecutively to the two consecutive, twenty-year minimum sentences he was already serving in the State of Washington.

After exhausting state remedies, *see State v. King*, 84 Or.App. 165, 733 P.2d 472, *rev. denied*, 303 Or. 455, 737 P.2d 1248 (1987), King filed a habeas corpus petition in federal district court under 28 U.S.C. § 2254. In his petition, King alleged that the failure of state authorities to fulfill their obligations under the plea agreement violated his right to fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. In addition, King asked the district court to decide: (1) whether the state had waived its objections to King's failure to enter a guilty plea by using his testimony at trial without insisting he enter a plea; (2) whether King was competent to enter or withdraw from a plea; (3) whether King was ever required to enter a plea before the start of his trial under the terms of the plea agreement, which was drafted by the state and did not contain a cut-off date for entry of plea; and (4) whether the state had demonstrated prejudice.

The district court did not address any of King's substantive arguments.[5] Rather, on April 23, 1992, the court dismissed King's habeas petition on the ground that it lacked jurisdiction because King had not demonstrated a violation of a federal constitutional right. In so ruling, the court concluded that King had not relied to his detriment on the state's promises in the plea agreement because *in King's own trial* the state did not use anything said

[5] King's habeas petition was referred to a Magistrate who made recommended findings of fact and conclusions of law, which the district court then adopted in their entirety.

or done by King under the plea agreement to secure his conviction.[6]

ANALYSIS

King alleges a violation of his right to fundamental fairness as guaranteed by the Fourteenth Amendment's Due Process Clause and therefore raises a cognizable claim for habeas corpus relief under 28 U.S.C. § 2254.

Specifically, King contends that it was fundamentally unfair for the state to reap the benefit of his substantial cooperation under the plea agreement and then turn around and rescind the agreement, which he had not breached. As support for such claim, King cites the following: (1) he disclosed relevant information to the police about Salter's involvement in Julie Salter's murder; (2) he testified for the state at Salter's bail and grand jury hearings; and (3) he testified for three days for the state at Salter's murder trial. Hence, King contends that he is entitled to specific performance of the plea agreement.

"Applying the Due Process Clause is . . . an uncertain enterprise which [requires that we] discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158-59, 68 L.Ed.2d 640 (1981). As a general rule, the fundamental fairness component of the Due Process Clause of the Fourteenth Amendment requires prosecutors to honor bargains made with criminal defendants. *See, e.g., Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984); *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *United States v. Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983). Because plea agreements

---

[6] "Detrimental reliance" is a phantom issue. The dispositive issue is "fundamental fairness" as required by the Due Process Clause.

implicate important due process rights, "the process must be fair." *United States v. Packwood,* 848 F.2d 1009, 1011 (9th Cir.1988).

This circuit has concluded that where a defendant has fulfilled *all obligations* under a plea agreement, "under settled notions of fundamental fairness the government [is] bound to uphold its end of the bargain." *Carrillo,* 709 F.2d at 37 (emphasis added) (citing *United States v. Irwin,* 612 F.2d 1182, 1189-91 (9th Cir.1980) (recognition of enforceability of cooperation agreements); *United States v. Garcia,* 519 F.2d 1343, 1345 & n. 2 (same); *United States v. Hallam,* 472 F.2d 168, 169 (9th Cir.1973) (where defendants fully discharge their obligations under plea agreement government is bound to fulfill its promise to forego future criminal prosecution)) (additional citations omitted).

Here, under the plea agreement, King agreed to provide information to the state regarding the involvement of co-defendant Salter in the murder of Julie Salter. King also agreed to testify for the state at bail hearings, grand jury proceedings, and the trial in the Salter prosecution.

In return, the state agreed *to allow* King to plead guilty to murder instead of aggravated murder and thereby receive a more favorable sentence.

The state now contends that under the plea agreement King was *obligated* to enter his guilty plea, and to do so by a certain date. Hence, the majority opinion concludes that, by asking the court to set a trial date, King breached the plea agreement by failing to perform an obligation thereunder. I disagree.

In interpreting a plea agreement, we hold the state to the *literal* terms of the plea agreement. *Packwood,* 848 F.2d at 1012; *United States v. Read,* 778 F.2d 1437, 1441 (9th Cir.1985), *cert. denied,* 479 U.S. 835, 107 S.Ct. 131, 93 L.Ed.2d 75 (1986). Here, the literal language of the plea agreement provides that the state

will allow, not require, King to enter a guilty plea as a result of his cooperation in Salter's prosecution. In addition, the language of the plea agreement does not state that King will relinquish his right to enter a guilty plea if he fails to enter such plea by a particular deadline.

Hence, I submit that one may properly assume from the literal language of the plea agreement that King was *allowed* to enter a guilty plea to murder at any time before the start of his own trial. Indeed, I note that the state did not hesitate to call King as a witness in Salter's trial in April 1984, *despite* the fact that King had not yet entered his guilty plea and had stated to the court in February 1984 that he wanted to withdraw from the "life endangering" plea agreement.

I therefore conclude that King affirmatively complied with *all* of his *obligations* under the plea agreement by providing all of the information and testimony required of him by the state.

Moreover, other factors convince me that King did not breach the plea agreement by requesting a trial date. King's competency was seriously at issue during this period because, despite his mental illness, King had stopped taking his medication. As a result, the court ordered several psychiatric evaluations and held a hearing to determine King's competency.[7] Also, King requested withdrawal from "all life endangering plea agreements" only after he had received serious death threats that had prompted prison officials to implement extraordinary security provisions to ensure his safety. Such threats re-

[7] King's apparent instability is evidenced by the fact that, despite his alleged desire to withdraw from the "life endangering" plea agreement, he still testified against Salter *for three days* at Salter's murder trial in accordance with the terms of such plea agreement. The state cannot urge this court to accept King's alleged intentions to withdraw from the plea agreement as credible when the state itself did not do so, but proceeded to call King as a witness in the Salter murder trial under the terms of the plea agreement.

sulted from his agreement to turn state's witness against Salter. In fact, King's counsel, at the time the motion to rescind was heard, specifically requested additional time to secure a transfer to Alabama state prison to ensure King's safety, to enable King to "make an intelligent decision as to whether he wants to pursue the plea agreement or go to trial." The court summarily denied this request.

In light of King's full compliance with *all obligations* under the plea agreement and his precarious mental state, which no doubt was exacerbated by the threats against his life resulting from his cooperation with the state, it defies reason to construe King's request for a trial date as a rescission of the plea agreement. The Oregon courts erred in so doing.

In light of the foregoing, I find that fundamental fairness as guaranteed by the Fourteenth Amendment's Due Process Clause mandates the specific performance of the state's obligations under the plea agreement.[8] Accordingly, I believe that this case should be remanded to the district court to issue a writ of habeas corpus directing the State of Oregon within 60 days to vacate King's conviction on condition that King enter a guilty plea and receive a sentence in accordance with the plea agreement, or, in the alternative, to release King from the strictures of his Oregon sentence.

---

[8] In light of this dispositive ruling, I see no need to address any other issues raised by the briefs or the district court's dismissal of King's habeas petition.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 90-315-DA

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN,
Superintendent, Clallam Bay Corrections Center,
Respondent.

ORDER

FRYE, Judge:

The Honorable William M. Dale, United States Magistrate Judge, filed Findings and Recommendation on March 6, 1992. Petitioner has filed timely objections to the Findings and Recommendation. When either party objects to any portion of a magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate's report. 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). The matter is before this court pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

This court has, therefore, given *de novo* review of the rulings of Magistrate Judge Dale. This court ADOPTS the Findings and Recommendation of Magistrate Judge Dale dated March 6, 1992 in its entirety.

IT IS HEREBY ORDERED that respondent's motion to deny habeas corpus relief (#10) is GRANTED, and this action is dismissed.

DATED this 21 day of April, 1992.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 90-315-DA

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN,
Respondent,

FINDINGS AND RECOMMENDATION

DALE, Magistrate-Judge

Background

Petitioner, a prisoner at Clallam Bay Corrections Center, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties agree that two issues remain to be resolved:

1. Was Petitioner's conviction for aggravated murder obtained in violation of his right to due process and against self-incrimination because the trial court refused to specifically enforce the parties' plea agreement; and
2. Was King's conviction barred by the speedy trial provisions of the Interstate Agreement on Detainers.

(*See* Minute Order of November 27, 1991.) Because of the chronology of facts upon which each issue depends, I address them in reverse order.

Discussion

I. *Interstate Act on Detainers.*

A. *Background.*

On March 4, 1982, Petitioner was indicted for the aggravated murder and murder of Julie Salter. (Respondent's Ex. 102.) At that time, Petitioner was incarcerated in the State of Washington. Accordingly, on November 20, 1982, the State of Oregon ("State") took custody of Petitioner pursuant to Article IV of the Interstate Agreement on Detainers ("IAD"). (Respondent's Ex. 106 at 1.) Petitioner was arraigned on November 22, 1982. (*Id.*; Respondent's Ex. 119 at 2-5.)

On March 18, 1983, Petitioner obtained a continuance of his trial date to April 18. (Respondent's Ex. 119 at 168-76, 181-82.) On April 11, 1983, Petitioner moved to quash the indictment on the basis that the State improperly excused a grand juror, resulting in an indictment violative of Article VII (amended), Section 5, paragraph 2, of the Oregon Constitution.[1] (*Id.* at 194-97.) The indictment was quashed, with leave to resubmit the case to the grand jury. (*Id.* at 241-42.)

On April 12, 1983, the State moved for a 30-day continuance for "good cause." (*Id.* at 242-B, 294.) On April 15, 1983, the trial court granted the motion, giving the State until May 15, 1983, to resubmit the case to the grand jury. (*Id.* at 294-95.) The trial court articulated the factual basis for its finding of "good cause" as follows:

> I think that the good cause is that a Grand Jury of six people returned this indictment, which was more than the quorum. I think this is good cause to be-

[1] Article VII (amended), section 5, paragraph 2, of the Oregon Constitution provides:

> A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

> lieve that seven people, five of whom would probably do the same thing. And I think they should review it and I think good cause exists for seven people to look it over. So I feel that that is good cause. (*Id.* at 295-96.)

In accord with this ruling, the trial court denied Petitioner's motion to compel his return to the State of Washington. (*Id.* at 294-96.)

On April 18, 1983, the State filed a second indictment which erroneously changed the State's theory surrounding the murder of Julie Salter. (Respondent's Ex. 103.) On that same day, Petitioner moved to dismiss the *first* indictment, with prejudice, on the basis that the State had failed to meet the 120-day time limitation of the IAD. (Respondent's Ex. 119 at 300-13.) The trial court denied Petitioner's motion. (*Id.* at 320-21.)

Because the second indictment involved a change of theory, the State filed a third indictment on April 19, 1983. (*Id.* at 321-25; Respondent's Ex. 104.) Petitioner was arraigned on that date and entered a plea of not guilty to the third indictment. (Respondent's Ex. 119 at 325-30, 335.) On May 3, 1983, the trial court denied Petitioner's motion to quash the third indictment. (*Id.* at 334-O-334-S; 334-DD - 334-EE.)

B. *Analysis.*

The IAD, codified at O.R.S. 135.775, is a compact among forty-eight states and the United States designed to effect the speedy disposition of outstanding criminal charges against prisoners incarcerated in other jurisdictions.[2] *United States v. Stoner,* 791 F.2d 1408, 1409 (9th Cir. 1986). Article IV of the IAD provides:

---

[2] The IAD "is an interstate compact approved by Congress and is thus a federal law within the meaning of § 2254." *Brown v. Wolf,* 706 F.2d 902, 905 (9th Cir. 1983). Accordingly, I make an independent determination of whether Petitioner's conviction was obtained in violation of the IAD. *Cody v. Morris,* 623 F.2d 101, 102-03 (9th Cir. 1980).

> In respect to any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or the counsel of the prisoner being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

O.R.S. 135.775, Art. IV(C).

It is undisputed that Petitioner extended the 120-day limitation of the IAD by 29 days. (Memorandum In Support of Answer to Respondent's Motion to Deny Habeas Corpus Relief at 37.) Petitioner challenges only the 30-day continuance granted to the State in order to permit it to resubmit the case to the grand jury. Petitioner concedes that "[i]f the court was correct in concluding that the state showed good cause when it requested a 30 day continuance to obtain a new indictment, then the 120 day period would have been tolled for 30 more days and petitioner's position that the 120 day speedy trial requirement of the IAD had been violated would be incorrect." (*Id.* at 40.)

Neither party has cited to any case law addressing whether the need to resubmit a case to the grand jury constitutes "good cause" for a delay within the meaning of Article IV. Petitioner relies upon *People v. C'Allah,* 474 N.Y.S.2d 305 (1984) and *State v. Shaw,* 98 N.M. 580, 651 P.2d 115 (1982). Neither case is dispositive of the issues presented here.

In *C'Allah,* the time limitations of the IAD expired without any request for a continuance on the part of the state. 474 N.Y.S.2d at 305. Similarly, in *Shaw,* the state's request for a continuance came *after* the time limitations of the IAD had expired. *Shaw,* 651 P.2d at 117-18; *see also State v. Aaron,* 102 N.M. 187, 692 P.2d 1336 (N.M. App. 1984) (request for continuance under IAD must be timely). In the present case, in contrast, the State timely moved for a continuance. (*See* Respond-

ent's Ex. 119 at 242-B, 294-95.) Accordingly, I find the reasoning in *C'Allah* and *Shaw* unpersuasive.

In light of the timely nature of the State's request, and considering the nature of the request, I agree with the Oregon Court of Appeals' holding in this case that the trial court did not err in granting a continuance for good cause shown. In light of the previous indictment returned by the grand jury, a continuance to resubmit the charges to the grand jury was both reasonable and necessary. The court of appeals aptly explains:

> Defendant argues that there is a contradiction in the trial court's rulings because, in dismissing the first indictment, the court found that there was not good cause for excusing one grand juror but, when the state requested a continuance, the court found good cause to continue. We see no contradiction. Although the prosecutor lacked good cause to excuse the juror, it does not follow that, when defendant's motion to quash was made just six days before his speedy trial period would expire, the state lacked good cause to seek a continuance to resubmit the case to the grand jury. The trial court did not err in denying defendant's motion. *State v. King*, 84 Or. App. 165, 170, 173, 733 P.2d 472 (1989), *rev denied*, 303 Or. 455 (1987).

It is worthy of note, that the foregoing conclusion does not require a finding that reindictment automatically recommences the time limitations of the IAD. *See Shaw*, 651 P.2d at 118-19 (rejecting argument that reindictment causes time limitations of the IAD to begin anew). Rather, the only issue is whether a trial court has the discretion to grant a continuance, upon a timely motion by the State, to permit the State to resubmit the case to the grand jury under the circumstances presented here. I conclude that the continuance was both necessary and reasonable within the meaning of Article IV of the IAD.

II. *The Plea Agreement.*

A. *Background*

On August 3, 1983, Petitioner entered into a plea agreement with the State. Under the terms of the agreement, Petitioner agreed to reveal all of his knowledge concerning James Salter's involvement in the murder of his wife and to testify truthfully in any trial against any person who may be indicted for the murder. (Respondent's Ex. 110 at 2.) In exchange, Petitioner would be permitted "to enter a plea of guilty to the charge of murder with the understanding that [he would] . . . receive a life sentence with an order that he serve a minimum of ten years before being eligible for parole." (*Id.*)

The plea agreement further provided that if Petitioner refused to cooperate "no evidence resulting from th[e] agreement, whether that evidence is information, persons, names, documents or physical exhibits, [would] be introduced by the state against the defendant in any trial or hearing unless the state can establish that it was already aware of that information." (*Id.* at 3.)

On September 14, 1983, and October 6, 1983, the parties sought continuances of Petitioner's trial date. (Respondent's Ex. 119 at 431-438.) On or about December 6, 1983, Petitioner testified at James Salter's grand jury proceeding. (*Id.* at 516-M.) On December 7, 1983, Petitioner withdrew his request for a trial and advised the court that he intended to enter a guilty plea. (*Id.* at 440.) The entry of Petitioner's plea was scheduled for December 14, 1983. (*Id.* at 440-41.) On that date, however, a further continuance was granted. (*Id.* at 446-47.)

In January, 1984, Petitioner testified at James Salter's bail hearing. (*Id.* at 516-L.) On February 24, 1984, Petitioner moved to dismiss his attorney, Mr. Lyons, and to proceed to trial *pro se.* (Respondent's Ex. 117 at 18, 20.) Petitioner indicated that he no longer wished to enter a guilty plea as previously agreed because the State refused

to assure him a transfer to Alabama, requested by Petitioner for security reasons. (*Id.* at 20, 22.) In response, Deputy District Attorney Eglitis stated:

> "Your honor, I would like to state for the record that Mr. King's motion not only requests the dismissal of Mr. Lyons . . . . but also that it states in its body that he's withdrawing in full, to-wit, from all life endangering plea negotiations that exist at present.
>
> "In that regard, Your Honor, since the plea negotiations, part of the terms of that, involve the State not using anything against Mr. King in the event of trial, anything that we learned during the pendency of his cooperation. I'd like to inform Mr. King that if he did take the stand in the Salter case that he should understand, having withdrawn from the negotiations, that anything he says can and will be used against him. And the State fully intends to do so. (*Id.* at 21.)

Petitioner's motion to proceed *pro se* was taken under advisement by the trial court. The court advised Petitioner against his intended course of action and informed him that Mr. Lyons would remain available to him over the weekend should he reconsider his intent to proceed *pro se* and to "renege" on the plea agreement. (*Id.* at 25, 31.)

The trial court reconvened on February 27, 1984, at which time Mr. Lyons informed the court that Petitioner had stopped taking his daily doses of Tegretol, Dilantin, Haldol, Lithium and Benadryl. (*Id.* at 34, 37.) As a result, Petitioner's motion to proceed to trial *pro se* remained under advisement and the trial court ordered that Petitioner be examined by Dr. Parvaresh to determine Petitioner's competency. (*Id.* at 39.)

In a letter to the court dated March 9, 1984, Dr. Parvaresh opined that Petitioner was not competent. (Re-

spondent's Ex. 111.) However, Dr. Parvaresh noted that Petitioner had agreed to begin taking his medication and that "in a period of seven to ten days with full usage of his medication, [Petitioner's] condition should once again become stable and at that point this issue of competency can once again be assessed." (*Id.*)

On March 12, 1984, Petitioner reiterated his desire to proceed *pro se*. (Respondent's Ex. 119 at 453.) In light of the trial court's inclination to hold the motion in abeyance for 7 to 10 days, as suggested by Dr. Parvaresh, Respondent orally moved to have Petitioner examined at the Oregon State Hospital. (*Id.* at 455-57.) Respondent's motion was granted due to the trial court's conclusion that Dr. Parvaresh's report was inconclusive as to Petitioner's competency. (*Id.* at 478.)

In April, 1984, Petitioner testified at the trial of James Salter. (*Id.* at 516-AA.) On May 31, 1984, a hearing was held to determine Petitioner's competency to stand trial. At the conclusion of the hearing, the trial court ruled that although Petitioner suffers from a "mental defect," he was able to assist in his own defense. (*Id.* at 518-19.) Mr. Lyons thereafter indicated that Petitioner sought to withdraw his motion to proceed *pro se* and that they were "prepared to set a trial date in this case." (*Id.* at 519.) At that time, Respondent again noted that Petitioner's intent to proceed to trial indicated his intent to withdraw from the plea agreement. (*Id.* at 520.)

On June 5, 1984, Respondent formally moved for an order declaring that Petitioner had rescinded the plea agreement. On June 9, 1984, the trial court ruled that the plea agreement had been rescinded by Petitioner and that Respondent was no longer bound by its terms. (*Id.* at 526-27.)

Approximately one month later, twelve days before trial, Petitioner moved for an order compelling specific performance of the plea agreement. Petitioner argued that specific performance was warranted due to his co-

operation at the trial of Mr. Salter and his relinquishment of several constitutional rights, including the right to a speedy trial and the right against self-incrimination. (*Id.* at 533-34.) The trial court denied Petitioner's motion, holding that Petitioner's decision to withdraw from the plea agreement and proceed to trial was a "well-informed decision." (*Id.* at 538-39.)

Petitioner proceeded to trial and was convicted by a jury of the aggravated murder of Julie Salter. Petitioner was sentenced to serve a life sentence, with a mandatory minimum of 30 years, to run consecutively to any sentence Petitioner is serving in the State of Washington. (Respondent's Ex. 101.)

B. *Analysis*

Petitioner claims that he is entitled to specific performance of the plea agreement because the agreement was rescinded after he had substantially performed his obligations thereunder. Petitioner points to the fact that he (1) spoke to the police about Salter's involvement in his ex-wife's murder; (2) testified for the state at Salter's bail and grand jury hearings; and (3) testified at Salter's trial. (Memorandum In Support of Answer to Respondent's Motion to Deny Habeas Corpus Relief at 4-5.) Petitioner concludes that it was "fundamentally unfair for the state to reap a windfall . . . by taking advantage of petitioner's cooperation . . ., then turn around and seek to rescind its agreement with petitioner." (*Id.* at 25.)

At the outset, it is worthy of note that this Court has no "supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips,* 455 U.S. 209, 222 (1982); *Wainwright v. Goode,* 464 U.S. 78, 83 (1983). In other words, in order to invoke this Court's habeas corpus jurisdiction, Petitioner must establish that the trial court's refusal to specifically enforce the plea agreement was violative of Petitioner's constitutional rights.

As noted by Respondent, the proper constitutional analysis in this case begins with the U.S. Supreme Court decision in *Mabry v. Johnson,* 467 U.S. 504 (1984). In that case, the Court held that a defendant's acceptance of a plea bargain does not create a constitutional right to have the bargain specifically enforced if it is withdrawn prior to the acceptance of a guilty plea. *Id.* at 507-10. Petitioner argues, however, that unlike the defendant in *Mabry,* he substantially performed the plea agreement, rendering its withdrawal unconstitutional. I disagree.

The Ninth Circuit has not rendered a definitive decision on this issue. In *McKenzie v. Risley,* 801 F.2d 1519 (9th Cir. 1986), *vacated in part on other grounds,* 842 F.2d 1525, 1536 (9th Cir. 1988), however, the court did state that detrimental reliance upon a plea agreement may make the agreement binding. 801 F.2d at 1527. However, the court further held that the disclosure of information in reliance upon a plea agreement did not constitute *detrimental* reliance where the information disclosed was obtained by the state from an independent source. *Id.* at 1527-28. In other words, the court focused upon whether the disclosure of the information pursuant to the plea agreement was truly detrimental to the defendant's interests at trial as opposed to whether the defendant had substantially complied with the agreement.

The reasoning in *McKenzie* is in accord with the First Circuit's decision in *U.S. v. Papaleo,* 853 F.2d 16 (1st Cir. 1988). In that case, the court similarly recognized that due process implications *may* arise by the withdrawal of a plea agreement detrimentally relied upon by the defendant. *Id.* at 18. In so holding, however, the court carefully distinguished between simple reliance and *detrimental* reliance prejudicing a defendant's right to a fair trial.

Noting that the defendant had not entered a guilty plea nor forgone a jury trial on any charge, the court in

Papaleo concluded that the defendant was "in no worse position than if no offer had ever been made by the government." *Id.* Hence, the defendant had no constitutional right to have the bargain enforced. *Id.* at 19; *see also Government of Virgin Islands v. Scotland,* 614 F.2d 360 (3rd Cir. 1980) (recognizing that detrimental reliance may give rise to due process implications if the reliance prevents a fair trial).[3]

Based on the foregoing, I conclude that the withdrawal of the plea agreement did not render Petitioner's conviction constitutionally infirm in light of the fact that Petitioner (1) was convicted after a jury trial; and (2) raises no argument that his prior reliance on the plea agreement deprived him of a fair trial. In sum, upon the withdrawal of the plea agreement, he was in no worse of a position than if the plea agreement had never been offered.[4] *See Papaleo,* 853 F.2d at 18; *Coon,* 805 F.2d at 825; *Scotland,* 614 F.2d at 365. Indeed, the plea agreement specifically provided that if it did not come to fruition, none of the information gained by the State would be used against Petitioner at trial. (Respondent's Ex. 110 at 3.)

---

[3] The Eighth Circuit has adopted a more stringent rule. In *Strokes v. Armontrout,* 851 F.2d 1085 (8th Cir. 1988), for example, the court held that the only type of detrimental reliance sufficient to estop the prosecutor from withdrawing a plea bargain is the actual entry of an involuntary guilty plea. *Id.* at 1090. The court explained that short of an involuntary guilty plea, the defendant remained "free to exercise his right to trial by jury, with all of its privileges and safeguards." *Id.* at 1091; *see also United States v. Coon,* 805 F.2d 822 (8th Cir. 1986) (until entry of involuntary guilty plea, defendant has not been deprived of any constitutionally protected liberty interest).

[4] Because I find that Petitioner did not detrimentally rely upon the plea agreement, I need not address whether the trial court properly considered the financial prejudice suffered by the State when reaching its decision not to order specific performance, nor need I address whether Petitioner was mentally competent when he *first* indicated his desire to withdraw from the plea agreement.

Conclusion

Respondent's Motion to Deny Habeas Corpus Relief (#10) should be GRANTED and this action should be dismissed.

DATED this 6th day of March, 1992.

/s/ William M. Dale
WILLIAM M. DALE
United States Magistrate

APPENDIX D

[Filed Mar. 11, 1994]

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

No. 92-35471

D.C. No. 90-315-DA

ROBERT HADEN KING, JR.,
Petitioner-Appellant,

v.

NEIL BROWN,
Superintendent, Clallam Bay Corrections Center,
Respondent-Appellee.

ORDER

Before: PREGERSON, KLEINFELD, Circuit Judges, and LEGGE, District Judge.*

Judges Kleinfeld and Legge vote to deny appellant's petition for rehearing. Judge Pregerson would grant the petition.

Judges Pregerson and Kleinfeld vote to reject the appellant's suggestion for rehearing en banc and Judge Legge would so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* The Honorable Charles A. Legge, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX E

28 U.S.C. 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of

> such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Interstate Agreement on Detainers, Or. Rev. Stat. § 135-.755:

The Agreement on Detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy

of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that the prisoner initiates a request for final disposition pursuant to Article III of this agreement or at the time that a request for custody or availability is initiated pursuant to Article IV of this agreement.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV of this agreement.

(d) "Department of Corrections institution" of this state shall mean any institution operated by the Department of Corrections.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, the prisoner shall be brought to trial within 180

days after the prisoner shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of imprisonment and the request of the prisoner for a final disposition to be made of the indictment, information or complaint: Provided, that for good cause shown in open court, the prisoner or the counsel of the prisoner being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) of this Article shall be given or sent by the prisoner to the warden or other official having custody of the prisoner, who shall promptly forward it together with the certificate to the prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden or other official having custody of the prisoner shall promptly inform the prisoner of the source and contents of any detainer lodged against the prisoner and shall also inform the prisoner of the right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) of this Article shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden

or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) of this Article shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) of this Article, and a waiver of extradition to the receiving state to serve any sentence there imposed upon the prisoner, after completion of the term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of the body of the prisoner in any court where the presence of the prisoner may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to the execution of the request for final disposition referred to in paragraph (a) of this Article shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom the

officer has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with paragraph (a) of Article V of this agreement upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; And provided further, that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon the own motion of the governor or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) of this Article, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner. Such authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or the counsel of the prisoner being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which the

prisoner may have to contest the legality of the delivery of the prisoner as provided in paragraph (a) of this Article, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to paragraph (e) of Article V of this agreement, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV of this agreement, the appropriate authority in a sending state shall offer to delivery temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of such prisoner, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV of this agreement, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for attendance of the prisoner at court and while being transported to or from any place at which the presence of the prisoner may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this argeement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this argeement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised,

the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing contained in this paragraph shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of such time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out

more effectively the terms and provisions of this agreement, and who shall provide within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the agreement into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the agreement. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by prisoners or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party to this agreement, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

APPENDIX F

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

No. 82-247

STATE OF OREGON,
Plaintiff,
-vs-
ROBERT HADEN KING, JR.,
Defendant.

PLEA AGREEMENT

(1) The defendant herein, Robert H. King, himself and through his attorney, enters into the following plea agreement with the State of Oregon.

(2) The trial presently set for August 8, 1983 will be continued at the defendant's request. The defendant will waive any speedy trial right he has under any federal or state constitution or statute for the period of this continuance only, and for any further continuances or periods of time necessary to carry out the terms of this agreement. The defendant will waive any speedy trial rights that presently exist under the Interstate Agreement on Detainers for the period of this continuance and for any further continuances or periods of time necessary to carry out the terms of this agreement.

(3) The defendant will consent to be interviewed by officers of the state or their agents in the presence of defendant's counsel concerning all facts he knows about the death of Julie Ann Salter on September 23, 1980. The officers of the state or their agents will investigate those facts and present the results of the investigation

to the state. The state will evaluate those facts on the issue of whether or not they provide independent corroboration of the defendant's representation that James Salter agreed to pay him money and things of value to arrange for the death of Julie Ann Salter.

(4) If the State concludes that said information, in conjunction with information otherwise known to the state, does provide said independent corroboration, then and in that event the state will allow the defendant to enter a plea of guilty to the charge of murder with the understanding that the defendant will receive a life sentence with an order that he serve a minimum of ten years before being eligible for parole, and that said sentence will run concurrent to any sentence the defendant is now serving.

(5) It is agreed that the state is the sole judge of whether said information does provide said independent corroboration sufficient for ORS 136.440. The state will exercise good faith in making said judgment.

(6) It is further agreed by the defendant that if such plea should be entered, that the state will seek a presentence investigation and the defendant will testify truthfully in any trial against any other person who may be indicted in the future for any crime connected with the death of Julie Ann Salter.

(7) The defendant further agrees to join in any postponement of his sentence pending any grand jury proceedings, or trial, of any individual(s) so indicted and that any time so served by the defendant will be credited toward his sentence.

(8) Should the defendant refuse to cooperate or give information requested pursuant to this agreement, or should the state conclude under the terms of this agreement that the information does not provide independent corroboration, the parties agree that no evidence resulting from this argeement, whether that evidence is information, persons, names, documents or physical exhibits, will

be introduced by the state against the defendant in any trial or hearing unless the state can establish that it was already aware of that information.

(9) The parties further agree that this agreement has been presented to the court pursuant to ORS 135.432 and that the court has agreed to proceed pursuant to this agreement under said statute.

(10) The parties hereto have read this argeement and it has been read by the defendant, who has had a full opoprtunity to discuss its contents with this attorneys, and the parties agree to the terms herein contained.

STATE OF OREGON:

By: /s/ S. Dennis Miller
S. DENNIS MILLER
8-3-83
Date

By: /s/ Andrejs I. Eglitis
ANDREJS I. EGLITIS
8/3/83
Date

ATTORNEYS FOR
ROBERT HADEN KING, JR.:

/s/ William T. Lyons
WILLIAM T. LYONS
8/03/83
Date

/s/ Joyce J. Cresswell
JOYCE J. CRESSWELL
8/3/83
Date

/s/ Robert Haden King, Jr.
ROBERT HADEN KING, JR.
8-3-83
Date

APPENDIX G

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

No. 82-247

STATE OF OREGON,
Plaintiff,

-vs-

ROBERT HADEN KING, JR.,
Defendant.

[Filed Jun. 4, 1984]

ORDER

This matter coming on to be heard on May 31, 1984 before the HONORABLE DALE JACOBS, State of Oregon appearing by S. Dennis Miller, Deputy District Attorney, defendant appearing in person and with counsel, William T. Lyons, and it appearing to the Court that this is the time set for a hearing on defendant's ability to aid and assist, the State having presented testimony, arguments and evidence were presented on both sides, and the Court being fully advised;

THE COURT FINDS the following:

1. That the defendant has a mental defect characterized as an organic personality syndrome.
2. That the defendant's behavior has been at times bizarre.
3. That the defendant is able to aid and assist in his own defense and cooperate with his counsel.

4. That the defendant is able to understand the nature of the proceedings against him.

5. That the defendant is able to participate in his own defense.

Therefore, the Court orders that, the defendant having entered his plea of NOT GUILTY, trial is set for August 20, 1984 at 1:30 p.m., notice thereof having been given in open Court.

DATED: June 4, 1984

/s/ Dale Jacobs
DALE JACOBS
Judge

APPENDIX H

GUY A. PARVARESH, M.D.
Physician
Diplomate, American Board
Of Psychiatry
Diplomate, American Board
Of Forensic Psychiatry

March 9, 1984

The Hon. Patrick D. Gilroy
Judge of the Circuit Court
Clackamas County Court House
Oregon City, Oregon 97045

Re: Mr. Robert King

Dear Judge Gilroy:

Mr. Lyons, Attorney for Mr. King informed me that he had agreed to undergo another psychiatric evaluation and, therefore, I was able to examine him on March 8, 1984. I also discussed his management with the guards at the Clackamas County Jail.

Mr. King has continued to refuse to take medication for about two weeks. As a result, he has become quite depressed, rather withdrawn, uninvolved and, to a great extent, emotionally and mentally confused and disorganized. The worsening of his condition is quite likely due to his continued refusal to take his medication. Even though he is alert and oriented at this time, nevertheless he continues to have disturbance of thinking and, to a great extent, paranoid ideation related to his feelings toward his attorney, his parents and just about everyone around him. After a lengthy examination he finally agreed to restart his medication and I have already contacted the nurse in charge of the jail and she will make every effort

to put him back on the prescribed medication which includes Dilantin, Lithium and a small dosage of Haldol.

It is my clinical opinion that at the present time Mr. King is not competent to stand trial as he is clearly mentally too impaired to assist in his own defense. Additionally, in reviewing his thoughts and feelings relative to his decision to represent himself, this leads me to believe that this action is the product of his underlying psychiatric disorder and, therefore, he is not competent to make that decision either. I believe, within reasonable medical probability, in a period of seven to ten days with full usage of medication, his condition should once again become stable and at that point the issue of competency can be once again be assessed.

Sincerely,

Guy A. Parvaresh, M.D. PC

JERRY K. LARSEN, M.D. P.C.
Physician and Surgeon

Practice Limited to Psychiatry

April 9, 1984

Michael Clancy
Attorney at Law
181 N Grant, Suite 203
Canby, Oregon 97013

Re: Robert King
DOB: 08/14/51

Dear Mr. Clancy:

At your request, on April 5, 1984 I again examined Robert King in the Clackamas County Jail. I had previously examined him in the same facility on September 9, 1983. Briefly, he was born in Alabama, one of five brothers. His father is a practicing attorney. He, in turn, completed law school but has not taken the Bar examination. He is married, has two children, and he reports that his adult life was free of significant problems until he was involved in an aircraft accident in January of 1979. He sustained head injuries, experienced memory loss, and has since required hospitalization and medications to control grand mal seizures.

During my last examination, medical reports revealed Tegretol, an anti-seizure medication, prescribed at 200mg, 4 times per day, and Dilantin 100mg, 5 daily. Mr. King reports that he has refused to continue such medication. He had been receiving Lithium Carbonate 300mg, 3 per day, and Haldol 1mg, twice per day, also currently being refused. He reports that he had been transported to the State Hospital in Salem. There he had also refused all such medications, and he alleges that his attending physicians agreed that they were not needed.

On my examination, a partially blackened right eye was noted with multiple scattered bruises of the upper extremities also noted. There was also a 2x3cm healed scar below the left eye, alleged to be a stab wound inflicted by unknown assailants during the past weeks. Mr. King continues, by his own report, to refuse any medication. He freely admits that he is actively hallucinating, that unknown voices direct him to hang himself, and that his seizures continue out of control. I asked the jail personnel to permit my examination of his medication records. I was assured that this was permissable, but after waiting 30 minutes, it appeared that the nurse was too busy to provide these records and I could wait no longer. I therefore cannot verify if medications are currently being administered.

MENTAL STATUS EXAMINATION: The patient was again interviewed in the Clackamas County Jail at approximately 2 PM on the afternoon of April 5, 1984. He was oriented as to time, date, place, and person. He was dressed in a sweatshirt and sweat-pants, wearing a full beard, with a noticeable partially blackened right eye. He remained affectually inappropriate throughout the entire examination. He spoke in a halting manner, searching for words, at times slurring sentences together, and generally spoke in a pressured, agitated fashion. He stuttered on occasion and displayed minimal eye contact. Both recent and remote memory were impaired. He could repeat 5 digits forwards but only 2 in reverse with intermittent errors. He made mistakes on simple subtraction and other mathematical calculations. He attempted serial 4 subtractions, but he abandoned this effort quickly. He would not attempt subtraction of serial 7's. He reported auditory hallucinations directing him to hang himself. Tactile hallucinations were reported with vague, nondescript visual hallucinations present intermittently. On this examination, he did not report distortions of smell or taste, felt in my original examination to be seizure-like

aura. He freely admitted to depression with marked sleep disturbance, hyperphagia, and a 30 to 40-pound weight gain. He also admitted to suicidal ideation with at least two reported attempts to hang himself. The patient's insight and judgment are impaired. He is highly paranoid. Although generally cooperative in my examination, my overall impression was that of general refusal to cooperate with jail personnel or attorneys.

IMPRESSION:

1. Probable Organic Brain Syndrome, Secondary to Trauma.
2. Probable Seizure Disorder, Grand Mal in Type.
3. Probable Psychotic State, Secondary to Trauma.
4. Exposure to Hepatitis (By Patient Report).

RECOMMENDATIONS: This unfortunate gentleman appears to experience uncontrolled grand mal seizures. Memory loss would be expected. Without appropriate anti-seizure medication, one would anticipate continued falling and subsequent injuries. The patient displays organic dysfunction and a marked intellectual impairment in even the most simple tasks. He is clinically depressed, actively hallucinating, and presents an ongoing danger to himself. Of immediate concern is his paranoid ideation and refusal to cooperate with his attorneys. He trusts no one, wishes to represent himself in all legal matters, and openly distrusts his attorneys.

In my opinion, this patient is actively psychotic and has an uncontrolled seizure disorder. As such, he cannot aid and assist in his own defense. I would strongly recommend that he be restarted on a major antipsychotic agent, such as Haldol, and that without question, appropriate anti-seizure medications, such as Dilantin and Tegretol, be started. Access to previous medical/neurological evaluations would save time and expense, and also hopefully

avoid repeating needless diagnostic evaluations. Such information might also speed control of seizures by avoiding a trial and error method of medications which perhaps have already been evaluated. I will be glad to assist you in the care of this patient.

Thank you for this referral.

Sincerely,

Larry K. Larsen, M.D.

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 93-1975

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONSE IN OPPOSITION

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
ROBERT M. ATKINSON
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

BEST AVAILABLE COPY

38 pp

QUESTIONS PRESENTED

1. Whether the court of appeals was obligated independently to review the state court's determination of petitioner's competency to withdraw from the plea agreement when the issue of his competency was not raised at trial or on appeal as a basis for federal habeas relief.

2. Whether petitioner was entitled to an evidentiary hearing on his competency to withdraw from the plea agreement when he did not request an evidentiary hearing on that issue.

3. Whether the particular facts and circumstances surrounding the dismissal of the petitioner's original indictment and his subsequent reindictment provided "good cause" to toll the time limits established by the Interstate Agreement on Detainers.

TABLE OF CONTENTS

Page

Questions Presented i

Introduction 1

Supplemental Statement of Facts 2

Reasons to Deny the Writ

I. Petitioner's first question presented was not raised as a ground for federal habeas corpus relief. 9

II. Petitioner's claim of entitlement to an evidentiary hearing bears only on a legal issue that has dropped out of this case. 15

III. This case presents only a narrow question of "good cause" to toll the IAD time limit. 18

IV. *Reed v. Farley* does not supply an independent basis to grant certiorari. 25

Conclusion 26

Appendix A

Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody App-1

TABLE OF AUTHORITIES

Page

Cases Cited

Birdwell v. Skeen, 983 F.2d 1332 (5th Cir. 1993) . . . 24–25

Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) 13

Cody v. Morris, 623 F.2d 101 (9th Cir. 1980) 26

Davis v. Wyrick, 766 F.2d 1197 (8th Cir. 1985) 14

Demosthenes v. Baal, 495 U.S. 731 (1990) 12

Dusky v. United States, 362 U.S. 402 (1960) 14

Flugence v. Butler, 848 F.2d 77 (5th Cir. 1988) 13

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 15

Gilmore v. Taylor, 508 U.S. ___, 113 S.Ct. 2112 (1993) 18

Godinez v. Moran, 509 U.S. ___, 113 S.Ct. 2680 (1993) 14

Goodwin v. State of Oregon, 116 Or. App. 279, 840 P.2d 1372 (1992) 21

Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991) . . . 13–14

Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) 14

Maggio v. Fulford, 462 U.S. 111 (1983) 9,12,13

Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992), *rev'd on other grounds*, *Godinez v. Moran*, 509 U.S. ___, 113 S. Ct. 2680 (1993) 13

People v. Allen, 744 P.2d 73 (Colo. 1987) 24

People v. C'Allah, 100 A.D.2d 754, 474 N.Y.S.2d 305 (N.Y. App. 1984) 23

Reed v. Farley, No. 93-5418 (1994) 25,26

Spitzweiser-Wittgenstein v. Newton, 978 F.2d 1195 (10th Cir. 1992) 13

State ex rel. Schrunk v. Bonebrake, 318 Or. 312, 865 P.2d 1289 (1994) 22

State v. Conger, 319 Or. 484, ___ P.2d ___ (1994) . . 20–21

State v. King, 84 Or. App. 165, 733 P.2d 472 *rev. denied*, 303 Or. 455 (1987) 7,8,14 20–21

State v. Shaw, 98 N.M. 580, 651 P.2d 115 (N.M. App. 1982) 23

State v. Stout, 305 Or. 34, 749 P.2d 1174 (1988) 20

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979) 24

Teague v. Lane, 489 U.S. 288 (1989) 18

Townsend v. Sain, 372 U.S. 293 (1963) 17

United States v. Cephas, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992) 23

United States v. Dion, 476 U.S. 734 (1986) 15

United States v. Ford, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom United States v. Mauro*, 436 U.S. 340 (1978) 24,25

Constitutional Provisions

Or. Const. Article VII (Amended), section 5 19

Statutory Provisions

28 U.S.C. § 2254 26

28 U.S.C. § 2254(d)(3) and (8) 16

28 U.S.C. § 2254(d)(7) 16

Or. Rev. Stat. § 132.110 19,20

Or. Rev. Stat. § 132.360 19

Or. Rev. Stat. § 135.510 20

Or. Rev. Stat. § 135.520 22

No. 93-1975

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONSE IN OPPOSITION

INTRODUCTION

Respondent, State of Oregon, finds little in the petition for writ of certiorari with which it can agree. Even disregarding their gratuitous attacks on the quality of justice in Oregon[1] and the integrity of the officials who prosecuted this case,[2] petitioner and

---

[1]The petition's statement of the case, for example, opens with the hyperbolic declaration: "Something is rotten in Oregon." Pet. Cert. 2.

[2]Petitioner and his *amici* come perilously close to accusing the members of the Clackamas County District Attorney's Office of unethical conduct when they charge that the state secured petitioner's presence in Oregon pursuant to an indictment that "it" knew was "patently unconstitutional under Oregon law." Pet. Cert. 20. *See also* n. 28, *infra* (discussing similar

(continued...)

his *amici* largely lose sight of the factual and procedural posture of this case. As a result, they misidentify the issues that the case fairly presents. This response therefore begins by offering a more complete description of the facts surrounding petitioner's withdrawal of his guilty plea. It then responds to each of the questions the petition presents, clarifying the procedural context as necessary and demonstrating in what way the question either is not presented at all, or is not the same question that petitioner seeks to have the Court decide.

SUPPLEMENTAL STATEMENT OF FACTS

The petition paints a picture of a seriously mentally ill criminal defendant who struck a plea bargain with prosecutors that they later, wholly without justification, refused to permit him to perform. Petitioner's description suggests that the state gained the full benefit of the plea bargain (information about the crime and petitioner's testimony against his co-defendant) and then took advantage of the petitioner's failure "formally" to enter his guilty plea as a basis to abandon the agreement altogether. The light in which petitioner has cast this case is, however, neither accurate, complete nor fair. Petitioner was, instead, a criminal defendant who became dissatisfied with the terms of the plea bargain he struck, who then tried unsuccessfully to alter those terms, and who declined to follow through on the plea agreement and insisted on going to trial when he could not get it changed.

In August of 1983, petitioner agreed in writing to plead guilty in exchange for the state's agreement to reduce the charge from

---

[2](...continued)

statements by *amici*). As discussed later in this response, the original indictment met all constitutional requirements and there is no question that, under state law, it should not have been dismissed by the trial court in the first instance.

aggravated murder (potentially a capital offense) to murder. Petitioner further agreed to provide information relevant to the investigation of other participants in the murder, and to testify against those other participants, including James Salter. The state agreed to recommend a life sentence, with a 10-year minimum sentence before parole eligibility, to be served concurrently with any other sentence petitioner was then serving. In December of 1983, petitioner requested a continuance of the entry of his guilty plea. By January or February of 1984, however, petitioner no longer liked the terms of the plea agreement. Even though he already had performed many of his responsibilities under the plea bargain (*i.e.*, he had provided investigatory information and he had testified in some of the proceedings relating to James Salter), petitioner wanted to strike a new deal. Specifically, he wanted his custody transferred to another state. Petitioner emphasizes in the certiorari petition that he was fearful that his life was in danger because of his cooperation against his co-defendants, and that he wanted the transfer for protection. Pet. Cert. 4–5. But he neglects to explain that his demand was specifically limited to a transfer to the State of Alabama, where petitioner's father practices law.[3] Exh. 119, at 516-P and -Q.[4] He also neglects to explain that he did not merely seek "permission to serve his sentence in * * * Alabama" (Pet. Cert. 5); rather, he wanted the State of Oregon to give Alabama authorities complete control over his legal custody, and specifically over parole and pardon decisions. *Ibid.* That demand simply was unacceptable, and state prosecutors would not agree to it.

---

[3]Petitioner's father is now among the lawyers representing him.

[4]Exhibit 119 is the state court transcript, which was made a part of the record in the federal habeas proceedings.

There is no question that petitioner suffers from a head injury incurred years earlier in an accident, that the accident evidently has altered petitioner's emotions and judgment, and that he requires medication for seizures.[5] But until his dissatisfaction with the plea agreement, petitioner had been able to proceed without any question as to his competency. He had been arraigned, he had negotiated and signed the plea agreement, he had provided investigatory information to police, he had testified in a "most impressive and professional manner" at James Salter's grand jury hearing, and he been an effective witness at Salter's bail hearing. Exh. 119, at 516-L through 516-O. When the state did not agree to the new demand to give up control over his physical and legal custody to Alabama, however, petitioner warned prosecutors that he would stop taking his medications and become psychotic. *Ibid.* His threat was consistent with earlier statements to jail personnel that, because he had minored in psychology in college and had studied the symptoms of mental illness, he knew how to "fake" mental illness. Exh. 119, at 516-H and -I. Despite the threat, the state stood by its refusal to alter the plea agreement. Petitioner, true to his word, stopped taking his medication.

Petitioner's condition deteriorated after that, whether because he was feigning incompetency or because he successfully impaired his competency by not taking his medication. Jail personnel, for example, observed him deliberately make himself look unkempt at strategic times — *i.e.*, before he was to appear as a witness at James Salter's trial and before he was examined by a physician appointed by the court to determine his competen-

---

[5] *See, e.g.*, Pet. Cert. App. 55a–62a (physicians' reports).

cy to stand trial.[6] His mental state either was erratic and unstable, or contrived. When he attended Salter's trial, for example, his competency as a witness was determined in a hearing outside the jury's presence. In the course of that preliminary examination, he gave confused and incoherent answers. After the court found him to be a competent witness and he was required to testify before the jury in the Salter trial, he immediately became able to answer all of the state's questions without uncertainty or hesitation. Exh. 119, at 516-T through -AA.[7]

During this period, his competency to proceed in his own case became an issue for the first time. Petitioner appeared before the state court judge on February 24, 1984, to ask permission to proceed *pro se* and to withdraw from his plea agreement. The court cautioned him against withdrawing from the plea bargain, told him to consider his decision further, and

---

[6]Petitioner stopped shaving, brushed his hair in front of his face, pulled his shirt out of his trousers, went without shoes and wore sweatclothes in place of the three-piece suits he wore to prior court appearances. Exh. 119, at 516-D, -E, -F, and -T.

[7]A newspaper report that petitioner placed in the record of the federal habeas proceeding described petitioner's remarkable transformation:

> King's testimony before the jury came after a morning marked by a bizarre turn of events when a disheveled, incoherent sounding King claimed, with the jury out of the courtroom, that he didn't know where he was or why he was being held in the Clackamas County jail. * * * Clackamas County Circuit Judge Patrick Gilroy, after hearing testimony from several county sheriff's deputies, ruled King was faking symptoms of insanity, and therefore was competent to testify, which, he pointed out, is not the same thing as being fit to stand trial. * * * King spoke with a ponderous Southern Accent and often held his head in his hands during testimony. Still, that was a far cry from the unkempt, confused-sounding King who testified out of view of the jury Wednesday * * *.

Exh. 42, at 1.

scheduled a hearing for three days later.[8] At the hearing, petitioner's attorney questioned petitioner's competency to make the decision to represent himself. Exh. 117, at 34. The court ordered petitioner to be examined by Dr. Parvaresh, whose examination was inconclusive. Exh. 117, at 39; Exh. 111; Pet. Cert. App. 58a. Dr. Parvaresh believed, however, that if petitioner would resume his medication, he would be stable enough to be reexamined in seven to ten days. Exh. 111; Pet. Cert. 58a. By March 12, 1984, petitioner still was not taking his medication; the court therefore ordered that petitioner be committed to the state mental hospital for further examination. Exh. 119, at 478.

On May 31, 1984, petitioner appeared before the trial court with his attorney, Mr. Lyons, who advised the court that petitioner during the prior two weeks had been taking his medication and that, as suggested by the report of Dr. Parvaresh, he was again competent to proceed.[9] Despite the fact that neither

---

[8]The court informed petitioner that if he reneged on the agreement, "you're back in the very vulnerable position you were in before you made your agreement, plus they have two days of your testimony, it seems like a foolish move on your part." Exh. 117, at 25.

[9]Mr. Lyons' statement to the court was quoted at length by the Oregon Court of Appeals when it affirmed petitioner's conviction:

> Your Honor, over the past couple weeks it apparently has been — the situation appears to be Mr. King has reinstated the use of his medication. That appears to be the information from the jail staff. And Mr. King himself, in conversation that I had with him over the last couple days, including up to and last evening, it appears that the medications are at — Dr. Parvaresh indicates in his report as well as Dr. Larson having the effect on Mr. King which they intended that they would, which is that *he is presently able to understand the nature of the proceedings against him and that he is able to assist.* At this time, based on that and the conversations I have had with Mr. King in which it does appear to me that

(continued...)

petitioner nor his attorney seemed to be questioning petitioner's competency, the state, out of an abundance of caution, put on expert testimony demonstrating petitioner's competency.[10] The court ruled that petitioner was able to aid and assist in his defense, and thus was competent to proceed.[11] Defense counsel immediately asked the court to set a trial date. The prosecutor reminded the court that there was a plea agreement in the case and asked for a commitment as to whether petitioner intended to

---

[9](...continued)

> although these reports indicate he does, in fact, suffer from a mental illness, nonetheless on his medications, *he is able to understand the nature of the proceedings against him and to assist his counsel as to the proceedings against him.*

State v. King, 84 Or. App. 165, 174, 733 P.2d 472 *rev. denied*, 303 Or. 455 (1987) (emphasis added by the Oregon Court of Appeals) *quoting* Exh. 119, at 483-C and -D. *See also* Exh. 119, at 483-C, -E, -F (counsel acknowledges that petitioner is stable, understands the nature of the proceedings and his options, and is able to aid and assist in his defense).

[10]The state offered the testimony of a psychiatrist with 18 years experience on the maximum security wards at the state mental hospital. Exh. 119, at 485. The doctor stated that he observed no hallucinatory or psychotic behavior on petitioner's part during his stay in the hospital. The doctor's diagnosis was that petitioner suffered from brain damage which affected his emotions and judgment, but not his intellectual capacity or his memory. Exh. 119, at 490. He described petitioner's refusal to take his medication as self-serving maneuvering designed to make him appear psychotic. Exh. 119, at 492.

[11]The trial court stated:

> I think that even considering the report of the other doctors, and what his behavior has been subsequent to that time, there is no question in my mind that he now understands the nature of the proceedings and that he is able to assist and cooperate with counsel and is able to participate in his defense.
>
> So you can put those findings in, if you want, in preparing the order, that I do find that he has a mental defect. But the other findings support, I think, the conclusion that he is able to proceed in his own defense.

Exh. 119, at 518-19.

enter a guilty plea. The defense was noncommittal,[12] and the court instructed the state to file a formal motion to set aside the plea agreement so that the matter could be resolved. Exh. 119, at 520–21.

The motion was heard on July 9, 1984, at which time one of petitioner's attorneys made it clear that the defense wanted more time to continue to try to work out an agreement to transfer petitioner's legal custody to Alabama. Exh. 119, at 524–25 (co-counsel Mr. Clancy). The state pointed out that most of its witnesses were out of state and that it did not want to embark on expensive trial preparations if petitioner intended to plead guilty. Exh. 119, at 525–26. The deputy district attorney stated that, based on petitioner's request for a trial date, he believed petitioner was withdrawing from the agreement. Exh. 119, at 526. The court asked defense counsel, Mr. Lyons, if he wanted to add anything. Mr. Lyons said that he had nothing to add. *Id.* The court found that defendant had rescinded the plea agreement and nullified it.[13]

REASONS TO DENY THE WRIT

I. Petitioner's first question presented was not raised as a ground for federal habeas corpus relief.

As a first basis for certiorari, petitioner asserts that this case presents the Court with "a perfect opportunity to clarify the

---

[12]Neither petitioner nor defense counsel disputed the deputy district attorney's assertion that petitioner was seeking to withdraw from the plea agreement by asking for a trial date. Nor did either suggest to the trial court that petitioner intended to comply with the agreement, that he objected to setting the agreement aside or that he objected to the entry of a not guilty plea. Exh. 119, at 510–11.

[13]That order was not made a part of this record. The Oregon Court of Appeals quoted it in its opinion affirming petitioner's conviction. *State v. King, supra*, 84 Or. App. at 175.

Court's decisions that underlie the circuit split of authority as to the factual and legal nature of the competency determination." Pet. Cert. 11. There are two problems with petitioner's presentation of this issue. The first is that the issue of petitioner's competency was not raised as a ground for federal habeas relief. The second problem is related: Because petitioner did not seek habeas relief on the basis that the state court erroneously determined that he was competent to rescind the plea agreement, petitioner has never before (until this petition for certiorari) questioned the legal standard applied by the state court. If the state court's resolution of petitioner's competency is properly an issue in this case at all, it is squarely controlled by this Court's decision in *Maggio v. Fulford*, 462 U.S. 111 (1983).

1. *Lack of preservation.*

Most of the procedural and factual misimpressions created by the petition are a result of omission. There is, however, one explicitly incorrect assertion in the petition's statement of the case, and it is critical to the first question presented. Petitioner states that he specifically asked the district court to decide, among other issues, whether "he was competent to withdraw from the plea agreement." Pet. Cert. 9. That statement is simply wrong.[14]

The petition for writ of habeas corpus asserted only three grounds for relief: (1) that petitioner's due process and self-incrimination rights were violated because the trial court would not specifically enforce the plea agreement; (2) that petitioner's

---

[14]On appeal to the Ninth Circuit, petitioner made the same wrong assertion. App. Br. 12. The state, in response, did not take petitioner to task on the point because petitioner was not, in any event, raising or arguing the issue on appeal. The dissenting opinion uncritically accepted petitioner's erroneous characterization of the issues before the district court. Pet. Cert. App. 22a.

prosecution was barred under the Interstate Agreement on Detainers (IAD) because petitioner is "mentally ill"; and (3) that the prosecution was barred under the speedy trial provisions of the IAD. App. 4–6 (Pet. for Writ of Habeas Corpus). There was no claim that petitioner was not competent to withdraw from the plea bargain, or that the state court either legally or factually erred in making the competency determination.

Petitioner later filed a memorandum in response to the state's motion to deny habeas corpus relief. In it, petitioner expressly abandoned the only claim that contained any reference to his mental state — *i.e.*, whether the IAD barred his prosecution on the basis that he was mentally ill. Pet. Memo. 2. Nothing in the memorandum challenged the state trial court's finding that petitioner was competent at the time he withdrew from the plea agreement. That is, petitioner did not ask the federal district court to revisit the issue of his competency; he did not claim that the state court had applied an incorrect legal standard in making that determination; he did not request an evidentiary hearing on the subject of his competency to withdraw from the agreement. *See generally* Pet. Memo. The Findings and Recommendation issued by the magistrate, and adopted by the district judge, confirmed that the only issues to be resolved by the court were whether petitioner was entitled to insist on specific enforcement of the plea agreement and whether the prosecution was barred by the IAD's speedy trial provisions. Findings and Recommendation, at 2; Order, April 21, 1992.

Nor did petitioner raise the question of his competency in his appeal to the Ninth Circuit. The only question he presented to the court below that had any bearing on the plea agreement was whether the state violated petitioner's due process rights when it failed to honor the plea bargain after petitioner had fully per-

formed his obligations under it. *See* App. Br. i. Again, petitioner did not argue that he was not competent to withdraw from the plea agreement; he did not claim that the state court had applied an incorrect legal standard to judge competency, or that its factual findings were unsupported or made without a full and fair evidentiary hearing; he did not ask the appeals court to order the district court to consider his competency to withdraw from the agreement or to hold an evidentiary hearing on his competency. Nor did he ask the appeals court to apply a different legal standard to the facts of competency found by the state court. *See generally* App. Br. Indeed, the majority expressly recognized that petitioner did not challenge *any* aspect of the state court's ruling that he was competent to stand trial: "The [state] court ruled that King was competent to stand trial, and that ruling is not challenged in this appeal." Pet. Cert. App. 6a.

Petitioner nevertheless reads the decision below to hold that the question of his competency to withdraw the plea agreement was purely one of fact, rather than a question of fact to be resolved pursuant to a correct legal standard for competency. To infer that holding would be unfair to the lower court, however, because whether competency is a question of fact or a mixed question of law and fact, and whether the state court below applied the correct legal standard, were never remotely at issue in this case. Petitioner's failure to raise any claim about his competency is probably explained by the fact that he and his attorney conceded rather than contested his competency when petitioner refused to enter a guilty plea and insisted instead on a trial date. The majority opinion discussed petitioner's competency only in response to the dissenting opinion's passing reference to

doubts about petitioner's mental state[15] and as a foreword to the majority's agreement with the state court's determination that it was petitioner, not the state, who chose to abrogate the plea agreement. Pet. Cert. App. 12a.

In short, contrary to petitioner's argument, the Ninth Circuit did not hold that the legal standard for competency applied by the state courts is insulated from habeas review; the issue was not before the appellate court below. The question petitioner seeks to have the Court decide simply is not presented in this case.

2. *There is no significant question for this Court to settle.*

Even if the Ninth Circuit's decision, by *dictum* or otherwise, suggests that it deferred to the state court competency determination, that deference was proper under *Maggio v. Fulford*, *supra*. In *Maggio*, this Court held that competency is a factual question in which the state court's determination is subject to the presumption of correctness when there is "no dispute as to the proper legal standard to be applied for determining the correctness of the trial court's actions." 462 U.S. at 116. The same was true in *Demosthenes v. Baal*, 495 U.S. 731 (1990). Petitioner relegates those cases to a footnote and tries to distinguish them on the basis that "[n]o legal issues surrounding the competency determination were involved." Pet. Cert. 13 n. 3. But the posture here is identical. As in *Maggio* and *Demosthenes*, petitioner never disputed the legal standard that the

---

[15]Pet. Cert. App. 25a–26a. The dissenting judge did not conclude that petitioner was not competent to withdraw his plea. Rather, the dissent was unwilling to construe petitioner's refusal to plead guilty as a rescission of the plea agreement due to several considerations, including concerns that petitioner was not competent on February 24, 1984, when he first attempted to represent himself and withdraw from the plea. Even the dissent did not appear to doubt petitioner's competency on May 31, 1984, at which point he had resumed his medication and was again cooperating with his attorney.

state court applied to the competency determination. To whatever extent the Ninth Circuit's decision can be read to review the state court's competency determination, that determination appropriately was reviewed by applying a presumption of correctness to the factual findings made by the state court because of the absence of a challenge to that legal standard.[16]

Petitioner's effort to manufacture a conflict among the circuits fails for the same reason. Each of the cases petitioner cites as holding that the legal standard for competency is beyond the scope of federal habeas review merely recognized, consistent with *Maggio*, that competency is solely a question of fact *if* the legal standard is not at issue.[17]

---

[16]The Ninth Circuit's decision in *Moran v. Godinez*, 972 F.2d 263 (9th Cir. 1992), *rev'd on other grounds*, *Godinez v. Moran*, 509 U.S. ___, 113 S. Ct. 2680 (1993), demonstrates that the court understands the correct approach when the legal standard is at issue:

> Even if the presumption of correctness could apply to a state court's finding that defendant was competent to waive constitutional rights, it cannot apply in Moran's case. This is so because, as the following discussion demonstrates, the state court applied the wrong legal standard to evaluate Moran's competency to waive constitutional rights.

972 F.2d at 266. Although this Court reversed the Ninth Circuit because the legal competency standard the court applied was incorrect, this Court expressed no reservation about the Ninth Circuit's understanding of the interaction of law and fact in resolving these questions.

[17]Petitioner cites *Spitzweiser-Wittgenstein v. Newton*, 978 F.2d 1195 (10th Cir. 1992); *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991); and *Flugence v. Butler*, 848 F.2d 77 (5th Cir. 1988), as holding that the federal courts may not review the state court's determination of competency if it is fairly supported by the record. Each case, however, like *Maggio* and this one, raised no question about the correctness of the legal standard applied by the state court. Moreover, two of those circuits unequivocally have demonstrated their recognition that the federal courts must review the legal standard applied by the state court if it is challenged. *See Bouchillon v. Collins*, 907 F.2d 589, 593 n. 11 (5th Cir. 1990) (acknowledging that the

(continued...)

Moreover, it is difficult to understand why petitioner thinks the question of the "factual and legal nature of the competency determination" (Pet. Cert. 11) warrants the Court's attention so soon after its decision in *Godinez v. Moran*, 509 U.S. ___, 113 S.Ct. 2680 (1993). There, the Court addressed the legal standard to be applied on habeas review of state court determinations of competency to waive constitutional rights. In light of that case, it is unlikely that the circuits would not be aware that some legal standard must be applied to a state courts' factual findings on competency when a petitioner's claim properly raises the issue.

Finally, petitioner's effort to suggest, for the first time in the petition for certiorari, that the state court applied an incorrect legal standard founders on his trial counsel's acknowledgment that petitioner was fit to aid and assist in his defense. *Godinez* holds that the standards for competency are "modest." An accused who wishes to waive rights must "ha[ve] the capacity to understand the proceedings and to assist counsel." 113 S.Ct. at 2688. Petitioner's counsel conceded that petitioner was "able to understand the nature of the proceedings against him and to assist his counsel as to the proceedings against him." *State v. King*, *supra*, 84 Or. App. at 174 (quoting counsel's representations). The state court announced its decision in the same terms. *See* discussion *supra* at p.7 n.11. Thus, petitioner conceded and the

---

[17](...continued)

state court must apply the correct legal standard to the facts of competency it finds); *Lafferty v. Cook*, 949 F.2d 1546, 1549-50 (10th Cir. 1991) (holding that the federal court reviews the legal standard applied by the state court *de novo*). That recognition is implicit in the Eighth Circuit's decision in *Griffin*, which began its analysis by discussing the legal standard for competency set out in this Court's opinion in *Dusky v. United States*, 362 U.S. 402 (1960), an acknowledgment that would have been superfluous if the court had viewed competency as solely a factual question. 935 F.2d at 929 n. 1. *Accord Davis v. Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985).

state court found that petitioner met the standard this court recently announced.

II. Petitioner's claim of entitlement to an evidentiary hearing bears only on a legal issue that has dropped out of this case.

Petitioner argues that the Ninth Circuit, in applying the presumption of correctness to the state court's findings, denied him the opportunity to present evidence that would, he asserts, have demonstrated that those findings were wrong.[18] Petitioner is careful, however, never specifically to identify those issues on which he sought an evidentiary hearing. Nor does he offer any basis on which the Court could conclude that the sole issue on which he asked for an evidentiary hearing could have affected the outcome of the case.[19]

---

[18]However one might characterize the claims presented by petitioner in this argument, they undeniably attack the *procedure* followed by the Ninth Circuit. *See* Pet. Cert. 18-19. Amicus GCDLA, by contrast, argues that the Ninth Circuit was substantively wrong in its application of due process principles to petitioner's efforts to reinstate the plea agreement. Indeed, the questions presented by GCDLA are neither those presented by petitioner nor fairly included therein as required by this Court's Rule 14.1(a). *Compare* Questions Presented, Pet. Cert. i, *with* Questions Presented, GCDLA Brief i. *Amici* may not expand the issues beyond those presented by the petitioner. *United States v. Dion*, 476 U.S. 734, 736 n. 3 and 746 (1986). Nor is the question that GCDLA seeks to present logically or legally antecedent to those presented by petitioner. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36–38 (1991) (Stevens, J., dissenting) (listing cases in which the Court has resolved questions that are antecedent to those raised by the parties). To the contrary, the procedural question raised by petitioner necessarily is antecedent to the substantive issue GCDLA seeks to inject.

[19]One other aspect of petitioner's second argument deserves comment. Petitioner sets up his argument by asserting that the district court concluded that it did not have jurisdiction to resolve petitioner's claims and that, on appeal, the Ninth Circuit inappropriately resolved the merits without returning the case to the district court for an evidentiary hearing. The district court, however, fully considered the merits of petitioner's claims. It concluded that petitioner failed to state a claim of constitutional dimension

(continued...)

Petitioner requested an evidentiary hearing in the district court on one issue only: whether the state court correctly found that the state was prejudiced by petitioner's withdrawal from the plea agreement. Pet. Memo. 34–36.[20] Petitioner relied on 28 U.S.C. § 2254(d)(3) and (8), asserting that the record did not contain any factual support for the claim of prejudice, and on § 2254(d)(7), claiming that fundamental fairness required the state to specifically perform the plea agreement where, *inter alia*, the only prejudice it claimed involved the undocumented costs of trial preparation. Pet. Mem. 34–36. Petitioner did not ask for an evidentiary hearing on any other basis or on any other issue. In particular, petitioner did not ask for or otherwise suggest that he should receive an evidentiary hearing on the question of his competency to withdraw from the plea agreement.

In his petition to this Court, however, the only issue on which petitioner claims a right to an evidentiary hearing is his competency to withdraw from the plea agreement. Pet. Cert. 17 n. 6, and 18.[21] Because petitioner did not suggest to the lower

---

[19](...continued)

that would invoke the habeas power, and it was only in that sense that the district court found that it did not have "jurisdiction" to grant petitioner habeas relief. *See* Pet. Cert. App. 37a.

[20]In addition to not seeking a hearing on his competency, petitioner did not ask the district court to hold an evidentiary hearing on the state court's finding that it was petitioner, not the state, who reneged on the agreement.

[21]Petitioner at times frames his second argument in vague terms, referring to his "inchoate claims" and his "plea agreement claims." Pet. Cert. 16, 17 n. 6, and 18. The only specific claim he mentions, however, is the competency issue. *Ibid.* For example, petitioner accuses the court of appeals of "jump[ing] to the conclusion that petitioner 'ha[d] not presented evidence *that he was incompetent* at the time of the court's ruling sufficient to establish by convincing evidence that the state court's determination was

(continued...)

courts that he was entitled to a hearing on his competency, he cannot fault either the district court or the Ninth Circuit for not addressing that unasserted claim. Thus, although petitioner correctly observes that *Townsend v. Sain*, 372 U.S. 293 (1963), requires district courts to hold evidentiary hearings under six specified circumstances, that assertion is irrelevant to the claims he presses in this Court. He never attempted to demonstrate that any of those circumstances applied to his competency claim.

If petitioner means to suggest that the district court erred by not holding an evidentiary hearing on the question of prejudice to the state — the only issue on which a hearing was requested — that claim no longer matters. Petitioner does not resurrect his original argument that due process requires the government to specifically perform a plea agreement in the absence of prejudice to the government's interests. That substantive issue is not advanced as an independent basis for certiorari, nor is it fairly subsumed within the questions petitioner presents. Unless petitioner plausibly can and actually does argue that due process *mandates* reinstatement of a previously rescinded plea agreement absent proof that the state was prejudiced by the rescission, an evidentiary hearing on prejudice can have no bearing on the case at this point.[22]

---

[21](...continued)

erroneous.'" Pet. Cert. 18 (emphasis added). If petitioner intended to suggest that he was entitled to an evidentiary hearing on some other factual claim, he has neither identified that claim nor suggested how he demonstrated that entitlement within the terms of *Townsend v. Sain*, 372 U.S. 293 (1963).

[22]GCDLA does advance the substantive argument, or one related to it, by asserting that petitioner was entitled under the Due Process Clause to specific performance of the plea agreement. *See* n. 18, *supra*. GCDLA does not, however, attempt to suggest that the principle on which it relies is

(continued...)

In short, the broad question relating to the availability of federal evidentiary hearings that petitioner seeks to have this Court decide is not fairly presented by this case. Petitioner did not seek an evidentiary hearing on the competency question. Yet, he no longer seeks to enforce the plea agreement on any theory other than the theory that he was not competent to withdraw from it. Thus, any claim that he should have been entitled to an evidentiary hearing to examine whether the state was prejudiced by his refusal to enter his guilty plea is either academic or moot.

III. This case presents only a narrow question of "good cause" to toll the IAD time limit.

Article IV(c) of the IAD provides, in part, that "for good cause shown in open court," the court "may grant any necessary or reasonable continuance" beyond the 120-day period in which a transferred prisoner must be tried. Petitioner tries to present, as a third issue in the petition, a broad question of the ability of a superseding indictment to extend the 120-day period for trial under the IAD. Specifically, petitioner makes the expansive claim that the Ninth Circuit "interpreted the IAD in a way that is inconsistent with the interpretations of all other courts to address

---

[22](...continued)

established. To the contrary, it presents this case as an "opportunity" to address rules of construction for plea agreements. GCDLA Brief 11. In other words, GCDLA asks the Court to announce a new rule in this case on habeas review — *viz.*, that due process entitles a criminal defendant who has partially performed the terms of a plea agreement and who then withdraws from the agreement before pleading guilty, to reinstate the agreement at will unless the state is prejudiced by the withdrawal. GCDLA does not urge that this rule is dictated by any prior decisions of this Court. Thus, it inevitably must be asking the Court to announce a new rule on collateral review, which the Court repeatedly has declined to do. *Gilmore v. Taylor*, 508 U.S. ___, 113 S.Ct. 2112 (1993); *Teague v. Lane*, 489 U.S. 288 (1989). GCDLA makes no claim that this case would fall within either of the two narrow exceptions to the *Teague* rule.

the issue by holding that the filing of a superseding indictment extends the time period specified by the IAD within which a state may try a prisoner held in custody pursuant to that Agreement." Pet. Cert. 19. In fact, the issue is narrow and distinctly fact-bound: May a state court find "good cause" for a continuance to allow the state to cure an arguably defective indictment, thereby tolling the 120-day period of the IAD, when the defendant's motion to dismiss the indictment is made on the eve of trial?[23] Before addressing that question, it is necessary to describe the true nature of the first indictment and its dismissal.

1. *The dismissal of the first indictment.*

Article VII (Amended), section 5, of the Oregon Constitution provides, in part: "A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment."[24] Or. Rev. Stat. § 132.110 allows the discharge of a grand juror who is unable to continue in the performance of duties. That statute provides that the court may "[a]llow at least five grand jurors to proceed upon good cause shown."

---

[23]As the district court pointed out in this case, its conclusion that the continuance was for good cause

> does not require a finding that reindictment *automatically* recommences the time limitations of the IAD. Rather, the only issue is whether a trial court has the discretion to grant a continuance, upon a timely motion by the State, to permit the State to resubmit the case to the grand jury *under the circumstances presented here.*

Pet. Cert. App. 33a (emphasis added; citation omitted).

[24]Echoing the constitutional provision, Or. Rev. Stat. § 132.360 provides:

> A grand jury may indict or present to the court for instruction as provided in ORS 132.370, with the concurrence of five of its members, if at least five jurors voting for the indictment or presentment heard all the testimony relating to the person indicted or facts presented.

Petitioner's first indictment was returned by a grand jury that initially consisted of seven grand jurors. Exh. 119, at 209. Later, one of the grand jurors was excused for business reasons. Exh. 119, at 212. Trial was set for April 18, 1983.[25] On April 11, 1983, on petitioner's motion, the trial court dismissed the first indictment, ruling that the grand juror's release had not been for "good cause" under Or. Rev. Stat. § 132.110. Exh. 119, at 241. In doing so, the trial court gave the state leave to resubmit the case to the grand jury and ordered a 30-day continuance (until May 15, 1983) for that purpose. Exh. 119, at 294-95.[26] The trial court found good cause for the continuance. Exh. 119, at 295-96.[27] On April 19, 1993, petitioner moved under the IAD to dismiss the indictment with prejudice for failure to try him within the 120-day period. Exh. 105. The trial court denied petitioner's motion, stating that "good cause has been shown [for the continuance] by the resubmission of the case to the Grand Jury . . . ." Exh. 119, at 320-21.

Or. Rev. Stat. § 135.510 provides the exclusive statutory grounds for dismissing an indictment, *State v. Stout*, 305 Or. 34, 41, 749 P.2d 1174 (1988), none of which includes that one grand juror improperly was dismissed. *State v. Conger*, 319 Or. 484,

---

[25]Petitioner arrived in Oregon on November 20, 1982. Ex. 106; *State v. King, supra*, 84 Or. App. at 169. Due to continuances to which petitioner agreed, trial was set for April 18, 1983. Exh. 106.

[26]Petitioner was not tried until August, 1984, due to continuances he requested.

[27]The trial court's order stated:

> THE COURT FINDS that the original indictment herein, having been quashed/set aside, and the Court having given leave to the State to resubmit the case to the Grand Jury, there exists good cause shown that this case be continued for thirty days * * *.

State v. King, supra, 84 Or. App. at 169 (quoting trial court order).

489, ___ P.2d ___ (1994). Further, under the Oregon Constitution, "a grand jury in which five or six members are participating may find an indictment, so long as five grand jurors concur in doing so." *State v. Conger, supra*, 319 Or. at 502. In short, although the issue was not settled at the time, the Oregon trial court that dismissed petitioner's first indictment did so incorrectly.[28]

2. *Because the continuance was for good cause, the 120-day time limitation was tolled; no conflict exists among the circuits.*

In light of the accurate description of the first indictment and its dismissal set out above, the question presented regarding the

---

[28]Petitioner states that "it is undisputed that petitioner was not even properly *indicted* within the time period specified in Article IV(c)." Pet. Cert. 20 (emphasis in original). He asserts that the state "knew" the first indictment "was patently unconstitutional under Oregon law." Pet. Cert. 20. *Amici* NACDL, ACDLA, and OCDLA repeat this misstatement: "[T]he very need for a superseding indictment was generated by the patently unreasonable action of the state in obtaining the original indictment in a knowingly illegal manner." Brief of *Amici* 17. *See* Brief of *Amici* 16 (the detainer was based on an indictment that was "knowingly and fraudulently obtained in violation of the Oregon Constitution.") Petitioner represents that the state had "full knowledge, *ab initio*, that the original indictment [was] entirely deficient." Pet. Cert. 21. Finally, petitioner states that the need to obtain the superseding indictment in this case was "occasioned by the bad faith of the prosecutor in securing the original indictment." Pet. Cert. 23.

Petitioner's and *amici*'s allegations ring especially hollow in light of the Oregon Supreme Court's clear holding in *State v. Conger, supra*, that an indictment returned by a grand jury of fewer than seven is constitutionally adequate, and is not subject to dismissal for failure to comply with statutory criteria for discharging grand jurors. At the time in question, it was settled practice in Oregon to discharge one and sometimes two grand jurors pursuant to the statute authorizing that procedure. The constitutionality of the statutory procedures was called into question only after the Oregon Court of Appeals' decision in *Goodwin v. State of Oregon*, 116 Or. App. 279, 840 P.2d 1372 (1992). The state of the law at the time petitioner was indicted — especially in light of the issue's ultimate resolution — does not even arguably justify the strident charges that state officials acted in "bad faith," "fraudulently," or "illegally" in securing the indictment against petitioner.

IAD is: When a criminal defendant moves one week before trial to dismiss an indictment, and the trial court incorrectly grants that motion, does the court's grant of a continuance to allow the prosecution to reindict constitute "good cause" for purposes tolling the 120-day period of the IAD?[29] The Ninth Circuit, agreeing with the Oregon Court of Appeals and the district court, concluded:

> The unanimous indictment was technically defective, but King did not move to dismiss it until the end of the time period, so the state had good cause for a thirty day continuance to take the case to a grand jury for another indictment.

Pet. Cert. App. 16a. The trial court had good cause to grant a continuance for the state to seek reindictment when petitioner moved to dismiss the first indictment nearly six months after he was arraigned in Oregon and only one week before his trial was to begin. *See* Or. Rev. Stat. § 135.520 (motion to dismiss must be filed within 10 days after arraignment); *State ex rel. Schrunk v. Bonebrake*, 318 Or. 312, 865 P.2d 1289 (1994) (motion to dismiss on grounds that grand jury was not composed of correct number must be filed timely under the statute). The Ninth Circuit's holding is correct.

Petitioner contends that the existence of a conflict among the circuits and various state courts requires review by this Court. Pet. Cert. 19. Petitioner, however, severely overstates the

---

[29]This question also replaces that posed by *amici* NACDL, ACDLA, and OCDLA:

> May the strict time limits of the Interstate Agreement on Detainers be extended by the state's need to obtain a superseding indictment following the dismissal of an indictment which was *unconstitutionally* obtained?

Brief of *Amici* i (emphasis added).

breadth of the Ninth Circuit's holding; as a result, he overstates the existence of a conflict. Whether a continuance in any given case is supported by "good cause" inherently is a fact-intensive question. The Ninth Circuit's pronouncement was limited: When a criminal defendant moves to dismiss an arguably defective indictment on the eve of trial and at the end of the IAD time period, the state has good cause for a 30-day continuance to seek an almost certain reindictment. Once the narrow, case-specific nature of the Ninth Circuit's holding is recognized, petitioner's perceived conflict evaporates. That is, in none of the cases cited by petitioner has a court held, in the circumstances of this case, that a continuance would not be for good cause, thus tolling the 120-day IAD time limitation.[30]

---

[30]In *United States v. Cephas*, 937 F.2d 816, 821 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992), for example, the Second Circuit addressed the government's argument "that because the charges against [the defendant], which had been the basis for the original detainer in issue, were dismissed, the detainer clock *automatically* stopped ticking and the 180-day period under article III disappeared." 937 F.2d at 821 (emphasis added). The Second Circuit's holding, which has nothing to do with the existence of "good cause," was that "[t]he government cannot lodge a detainer against the defendant and then throw out the clock every time it dismisses charges, only to start the clock anew by bringing a new set of charges." *See also People v. C'Allah*, 100 A.D.2d 754, 474 N.Y.S.2d 305 (N.Y. App. 1984) (rejecting state's argument that a new indictment erased the first indictment, thereby making the 180-day Article III time limit inapplicable). The state has no quarrel with those general statements. More importantly, they are not inconsistent with the Ninth Circuit's holding in this case.

Nor does *State v. Shaw*, 98 N.M. 580, 651 P.2d 115 (N.M. App. 1982) support the existence of a conflict. Like *Cephas* and *C'Allah*, *Shaw* rejected the state's argument that a second indictment started anew the running of the 180-day period under Article III. 651 P.2d at 118–19. The *Shaw* court noted that the state never had argued that the need to obtain a second indictment tolled the initial 180-day period, and it suggested that the prosecution should have sought a continuance for good cause — which was done here. 651 P.2d at 119-120.

(continued...)

Unlike the cases cited by petitioner, the state never argued in this case — and the Ninth Circuit did not hold — that the dismissal of the first indictment made the 120-day time limitation "disappear." The Ninth Circuit did not hold that the second indictment started a new 120-day time limitation. Nor did the appeals court hold that any continuance for reindictment "automatically" is a continuance for good cause, tolling the IAD time limitation.

Petitioner also asserts that the Ninth Circuit's decision in this case conflicts with decisions in the Second and Fifth Circuits addressing "administrative snafus." Pet. Cert. 23. In support of that proposition, he cites *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom United States v. Mauro*, 436 U.S. 340 (1978), and *People v. Allen*, 744 P.2d 73 (Colo. 1987). Yet, none of those cases addressed a situation where, because of a defendant's successful eleventh-hour motion to dismiss an indictment — one that is, at most, technically defective — the state needs time to secure a second indictment. This case does not involve an "administrative snafu," but rather a reasonable need to react to a defendant's late motion.[31] No conflict exists.

---

[30](...continued)

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979), cited by *amici* NACDL, ACDLA, and OCDLA is inapposite. In that case, the court never addressed whether a requested continuance was supported by "good cause." Rather, the court's only remotely relevant statements addressed the "shown in open court" requirement of Article IV. 587 F.2d at 839.

[31]In *Birdwell*, the issue was under what circumstances a continuance would toll the time limitation. The *Birdwell* court held:

> A continuance which is granted to allow a party to ascertain whether testimony is necessary for a dismissal hearing is not

(continued...)

By refusing to recognize the limited nature of the Ninth Circuit's holding, by ignoring the case-specific character of the "good cause" determination, and by quoting opinions from other courts out of context, petitioner has attempted to create a conflict out of thin air.

IV. *Reed v. Farley* does not supply an independent basis to grant certiorari.

In his supplemental memorandum of authority, petitioner suggests that "this case provides the Court with an opportunity to address the precise question it left open in *Reed* [*v. Farley*, No. 93-5418] — whether a prisoner who objects to delay can state a claim cognizable under Section 2254." Memo. 2-3; *see also* Brief of *Amici* 5-6 (same). To the contrary, this case is not one in which the Court should grant certiorari to address whether a trial court's failure to observe the 120-day rule of Article IV(c) is cognizable in federal habeas.

---

[31](...continued)

> upon good cause when the party requesting the continuance could have made the determination prior to the hearing by using reasonable diligence. Good cause did not exist in this case[.]

983 F.2d at 1340. That case-specific statement is not inconsistent with the Ninth Circuit's decision in this case.

Nor is the holding in *Ford* inconsistent with the Ninth Circuit's decision in this case. In *Ford*, the court found that the delays that occurred before defendant was tried were not for "good cause" when they were the result of the defendant's case being shuffled among different courts and being delayed due to a congested docket. 550 F.2d at 743. That fact-specific conclusion is not inconsistent with the Ninth Circuit's decision in this case.

Finally, in *Allen*, the issue was whether the defendant had waived the 120-day period by acquiescing in the setting of two trial dates outside of the 120-day period. Due to "an unfortunate combination of circumstances," 744 P.2d at 77, not all parties were aware of existence of the 120-day period. *Allen* stands only for the rule that the burden is on the prosecution to ensure that the trial is set within the period required by the IAD. Again, that has nothing to do with the issue decided by the Ninth Circuit in this case, *viz.*, whether the particular facts of this case constitute "good cause."

Whether a violation of Article IV's 120-day period is cognizable under 28 U.S.C. § 2254 never has been contested by the state; under controlling Ninth Circuit precedent, *see, e.g., Cody v. Morris*, 623 F.2d 101, 103 (9th Cir. 1980), the state was bound to accept that the district court had jurisdiction to consider the IAD claim. Accordingly, the issue was not considered in the first instance by the district court or the court of appeals; the issue would be better addressed by this Court in a case where it was raised below. Moreover, this Court necessarily will address the issue left open in *Reed* in any case that presents a valid issue regarding the IAD. It would make little sense for the Court to grant certiorari to address the *Reed* issue in this case, where the substantive IAD issue is meritless.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
ROBERT M. ATKINSON
ROBERT B. ROCKLIN
Assistant Attorneys General
Counsel for Respondent

September 15, 1994

APPENDIX A

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO241 (Rev. 5/85)

United States District Court	District: Oregon	
Name: ROBERT HADEN KING, JR.	Prisoner No.: 284587	Case No.: CV90-315DA
Place of Confinement: Clallam Bay Corrections Center, Clallam Bay, WA		
Name of Petitioner (include name under which convicted): Robert Haden King, Jr. V.	Name of Respondent (authorized person having custody of petitioner): Neil Brown Superintendent Clallam Bay Corrections Center	
The Attorney General of the State of: Oregon		

PETITION

1. Name and location of court which entered the judgment of conviction under attack Circuit Court of State of Oregon for Clackamas County, 807 Main Street, Oregon City, OR 97045
2. Date of judgment of conviction Nov. 13, 1984
3. Length of sentence Life with 30 year mandatory minimum consecutive to sentence defendant serving in Washington state.
4. Nature of offense involved (all counts) Aggravated Murder

AO241 (Rev. 5/85)

5. What was your plea: (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another county or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:
   (a) Name of court Oregon Court of Appeals
   (b) Result Conviction Affirmed
   (c) Date of result and citation, if known March 4, 1987 State v. King, 84 Or.App. 167 (1987)
   (d) Grounds raised (1) Violations of Interstate Agreement on Detainers; (2) failure to specifically enforce plea bargain; (3) improperly obtained indictment; (4) transactional immunity and double jeopardy; (5) tainted identification testimony; (6) hypnotically enhanced testimony; (7) prosecutorial misconduct; (8) insufficient evidence.
   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
      (1) Name of Court Oregon Supreme Court
      (2) Result Review Denied
      (3) Date of result and citation, if known May 27, 1987
      (4) Grounds raised Same as direct appeal.

AO241 (Rev. 5/85)

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal: N/A

(1) Name of Court _____

(2) Result _____

_____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information: N/A

(a) (1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

AO 241 (Rev. 5/85)

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

AO 241 (Rev. 5/85)

(j) Denial of right of appeal.

A. Ground one: Conviction obtained by a violation of petitioner's rights to due process and against self-crimination since trial court failed to specifically enforce plea bargain.

Supporting FACTS (state *briefly* without citing cases or law) Plea Agreement to allow petitioner to plead to reduced charge in exchange for his cooperation in the prosecution of a co-defendant. Petitioner substantially performed his duties under the Plea Agreement by providing information and testimony. Plea Agreement included no time limit for entry of guilty plea and prosectuion's subsequent insistence that plea be entered on a specific date violated the terms. Petitioner did not knowingly and voluntarily relinquish his rights under the Agreement.

B. Ground two: Prosecution barred by Article VI(b) of the Interstate Agreement on Detainers since petitioner was "mentally ill"; petitioner was entitled to an evidentiary hearing to establish mental illness.

Supporting FACTS (state *briefly* without citing cases or law):

Prior to his transfer from Washington to Oregon under the Interstate Agreement on Detainers, petitioner had been determined to be "mentally ill" or impaired by a mental defect. Pending trial in Oregon petitioner became mentally. The trial court's

AO 241 (Rev. 5/85)

hearing violated the Interstate Agreement on Detainers.

C. Ground three Petitioner's prosecution was barred under the speedy trial provisions of the Interstate Agreement on Detainers.

Supporting FACTS (state *briefly* without citing cases or law): On 11-20-82 Oregon took custody of petitioner under the I.A.D. Petitioner expressly consented to extensions of the speedy trial period totalling 29 days. On 4-11-83 the trial court quashed the original indictment. On 4-18-83 the State filed a second indictment. On 4-19-83 the State filed a third indictment and moved to dismiss the second indictment. Defendant's motion to set aside the indictment on statutory speed trial grounds was denied and the State's motion to postpone trial for an additional 30 days was granted improperly.

D. Ground four _____

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing William T. Lyons

AO 241 (Rev. 5/85)

(b) At arraignment and plea William T. Lyons, Michael J. Clancy

(c) At trial William T. Lyons, Michael J. Clancy

(d) At sentencing William T. Lyons, Michael T. Clancy

(e) On appeal John Daugirda

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any further sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be serve in the future: _____
(b) Give date and length of the above sentence: _____
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

[signature omitted in printing]
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12/10/89 (date)

/s/ Robert H. King Jr.

(3)

Supreme Court, U.S.
FILED
JUN 27 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL MEMORANDUM OF AUTHORITY

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

June 27, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1975

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL MEMORANDUM OF AUTHORITY

Petitioner submits this supplemental memorandum pursuant to Rule 15.7 of the Rules of this Court in light of this Court's decision in *Reed* v. *Farley*, No. 93-5418 (June 20, 1994), which was decided 11 days after the petition was filed. Petitioner files this memorandum so that respondent will have an opportuity to address his arguments concerning *Reed* and so that the Court may consider petitioner's arguments at the same time that it reviews the State's response.

In *Reed*, this Court held that a prisoner's claim that his right to a speedy trial under the Interstate Agreement on Detainers had been violated was not cognizable under 28 U.S.C. § 2254 where the prisoner had failed to register any objection to the trial date when it was set. This

Court reasoned that such a violation was not " 'a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure.' " Slip Op. at 9 (quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). This Court expressly declined, however, to consider whether it would "confront an omission of the kind contemplated in *Hill* . . . if a state court, presented with a timely request to set a trial date within the IAD's 120-day period, nonetheless refused to comply with [the Act's speedy trial provision]." *Id.*

Justices Blackmun, Stevens, Kennedy and Souter dissented, arguing that the Court had "disregard[ed] Congress' unambiguous judgment about the severity of, and the necessary remedy for, a violation of the IAD time limits." Dissent at 2. The dissenters argued that

> Congress spoke with unmistakable clarity when it prescribed both the time limits for trying a prisoner whose custody was obtained under the IAD and the remedy for a violation of those limits. . . . Quite simply, Congress has determined that a receiving state must try the defendant within 120 days or not at all.

Id. at 9-10.

The petition in this case presents the question whether a superseding indictment may extend the IAD's 120-day time limit. This Court should review that question because the Ninth Circuit's holding conflicts with the holdings of every other court to address the issue. Pet. at 19-23.

This Court's decision in *Reed*, however, provides two additional reasons why the petition should be granted. *First*, petitioner raised timely objections to the extension of time which ultimately caused him not to be tried within the 120-day limit. *Id.* at 20-21 & n.8. Thus, this case provides the Court with an opportunity to address the precise question it left open in *Reed*—whether a prisoner who objects to delay can state a claim cognizable

under Section 2254. By deciding this question now, this Court can immediately resolve an issue which will otherwise create substantial but unnecessary confusion among the lower courts.

Second, the question presented by the petition turns largely on whether Congress seriously intended that cases not brought to trial within the time limits established by the IAD must, as Article V(c) of the Act appears to require, be dismissed with prejudice. In several cases, this Court has held that the purpose of the Act is "to encourage the *expeditious* and orderly disposition of [outstanding] charges," *Carchman* v. *Nash*, 473 U.S. 716, 720 (1985) (emphasis added) (internal quotations omitted); *United States* v. *Mauro*, 436 U.S. 340, 360 (1978) (internal quotations omitted), thus indicating strongly that *any* violation of the Act's speedy trial provisions should be considered extremely serious. The Court's decision in *Reed*, however, appears to cast doubt on the continuing vitality of that position. By addressing the question presented, the Court could resolve the tension among these decisions before it engenders any additional confusion among the lower courts.

For these reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

June 27, 1994

* Counsel of Record

Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE GEORGIA CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BOBBY LEE COOK
(Counsel for the Georgia
Criminal Defense Lawyers
Association)
Cook & Palmour
126 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

July 11, 1994 Counsel of Record

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE GEORGIA CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BOBBY LEE COOK
(Counsel for the Georgia
Criminal Defense Lawyers
Association)
Cook & Palmour
126 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

July 11, 1994 Counsel of Record

ISSUES ADDRESSED BY THE AMICUS CURIAE

1. Does an accused have any constitutional right to enforcement of a plea agreement, based on the due process clause of the fourteenth amendment, where the accused has not yet entered a guilty plea but has performed his part of the bargain by his extensive and life threatening cooperation with the government and by testifying fully at another's trial?

2. Is it proper for a court to fail to consider the due process principles of fundamental fairness which should govern plea agreements in determining whether a defendant has knowingly and intelligently rescinded his plea agreement?

TABLE OF CONTENTS

	Page
ISSUES ADDRESSED BY THE AMICUS CURIAE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTORY STATEMENT	5
REASON FOR GRANTING THE WRIT	11
CONCLUSION	43

TABLE OF AUTHORITIES

Cases	Page
Berger v. United States, 295 U.S. 78 (1935)	29, 30
Blackledge v. Allison, 431 U.S. 63 (1977)	25
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	24
Brady v. Maryland, 373 U.S. 83 (1963)	30
Commonwealth v. Reyes, 764 S.W.2d 62 (Ky. 1989)	20
Ex parte Yarber, 437 So. 2d 1330 (Ala. 1983)	20
Hudson v. McMillan, 112 S. Ct. 995 (1992)	35
Innes v. Dalsheim, 864 F.2d 974 (2d Cir. 1988)	26
Jacobson v. United States, 112 S. Ct. 1535 (1992)	30
King v. Brown, 8 F.3d 1403 (9th Cir. 1993)	21, 32, 33, 39
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	31, 42
Mabry v. Johnson, 467 U.S. 504 (1984)	13, 15, 16, 17 passim

TABLE OF AUTHORITIES (CONT'D)

Cases — Page

People v. Navarroli, 121 Ill. 2d 516, 521 N.E.2d 891 (1988) 18

Ricketts v. Adamson, 483 U.S. 1 (1987) . . . . . 11, 24, 25, 33 passim

Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982) 20

Santobello v. New York, 404 U.S. 257 (1971) 23, 24, 30, 31

State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976) 20

Stokes v. Armontrout, 851 F.2d 1085 (8th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) 17, 27, 29

Townsend v. Sain, 372 U.S. 293 (1963), overruled on other grounds, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) 2

United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983) 19

United States v. Coon, 805 F.2d 822 (8th Cir. 1986) 18

United States v. De La Fuente, 8 F.3d 1333 (9th Cir. 1993) 27

United States v. Garcia, 956 F.2d 41 (4th Cir. 1992) 41

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
United States v. Harvey, 791 F.2d 294 (4th Cir. 1986)	40
United States v. Marion, 404 U.S. 307 (1971)	30
United States v. Mozer, 828 F. Supp. 208 (S.D.N.Y. 1993) . . .	41
United States v. Smith, 648 F. Supp. 495 (S.D. Tex. 1986) . . .	26
Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979)	27
Statutes	
Restatement (Second) of Contracts (1981)	33, 42
Sup. Ct. R. 37.2	5
Other	
Alschuler, "The Changing Plea Bargaining Debate," 69 Cal. L. Rev. 652 (1981)	29
Scott & Stuntz, "Plea Bargaining as Contract," 101 Yale L.J. 1909 (1992)	4

INTEREST OF THE AMICUS CURIAE

The Georgia Criminal Defense Lawyers Association (GCDLA), is a Georgia nonprofit corporation with a membership of more than 1,000 lawyers. GCDLA was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of defense lawyers.

Among GCDLA's stated objectives is the promotion of the proper administration of criminal justice. Consequently, GCDLA is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The Amicus Curiae Committee of the GCDLA has discussed this case and de-

cided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that GCDLA should offer its assistance to the Court.

In this case, the Ninth Circuit failed independently to review the state court's determination of competency and also failed to require the district court to hold a hearing on petitioner's habeas claim as mandated by Townsend v. Sain, 372 U.S. 293 (1963), overruled on other grounds, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). As the petition demonstrates, the Ninth Circuit's decision conflicts with decisions of other courts of appeals and this Court, and for that reason the petition should be granted.

GCDLA submits this brief respectfully to describe how the Ninth Circuit's decision undermined petitioner's due process right to fundamental fairness in

the plea bargain process, and how this decision, if allowed to stand, will dramatically affect the plea bargaining process in the future. Petitioner entered into a plea agreement with the State of Oregon and fully performed his obligations under that agreement, at great personal risk. Nonetheless, the state reneged on the agreement when, during a period of mental instability, petitioner temporarily refused to enter a formal plea. However, because petitioner was not afforded any hearing on his habeas claim, and because the Ninth Circuit gave unwarranted deference to the district court's determination that he was competent, he had no opportunity either directly to challenge the state's violation of his plea agreement or to seek independent review of his competency at the time he allegedly "withdrew" from that agreement.

The impact of decisions such as the Ninth Circuit's on the criminal justice system cannot be overstated.[1] If criminal defendants, including those who are mentally incompetent, cannot challenge violations of plea agreements through the mechanisms that petitioner sought to use in this case, then law enforcement authorities will have great latitude to violate such agreements with impunity. If that occurs, criminal defendants will no longer trust prosecuting authorities to protect them from the risks inherent in cooperating with the state, and the authorities will lose an

---

[1]Recent studies have shown that as many as 86% of federal prosecutions and 91% of state prosecutions are resolved with guilty pleas. Scott & Stuntz, "Plea Bargaining as Contract," 101 Yale L.J. 1909 n.1 (1992).

extremely valuable tool in fighting crime at its roots.[2]

INTRODUCTORY STATEMENT

This case presents an unfortunate and distressing story of how, under the guise of following contract principles, state and federal courts have unfairly permitted an Oregon state prosecutor to reap the considerable benefits of a plea agreement entered into with the Petitioner, Robert Haden King Jr., and then subsequently deny King his part of the bargain when, during a period of time when King was known to be mentally confused and suffering from an organic mental defect, mental illness, and epilepsy, King irrationally became unclear about his intention to enter his guilty plea.

---

[2]Pursuant to Rule 37.2 of this Court, both the Petitioner and the Respondent have consented to GCDLA's participation as amicus curiae, and letters of consent are being filed with the Court.

The facts underlying the plea bargain between King and the State of Oregon have been set out fully in King's Petition for a Writ of Certiorari. Of critical significance to an understanding of the issues in this case is the fact that King fully performed his part of the agreement, cooperating fully with the state and testifying at great length for the state on several occasions between December 1983 and April 1984.

Equally significant is the fact that during the period of King's performance of his part of the plea agreement, and shortly thereafter, King was the object of serious death threats as a result of his cooperation with the state. The record below completely substantiates the fact that the death threats from organized crime figures against King were genuine and were so intimidating that local prison authorities had to adopt the

most extraordinary security provisions in their history to ensure King's safety.

In addition, compounding the pressures from these death threats was the fact that during this entire period King was suffering from severe mental problems which inhibited his ability to act rationally in connection with his own case. The pressures of his situation led King to stop taking his medication, or to take his medication only erratically, and prison authorities did nothing to remedy this problem. To the contrary, prison authorities added to the problem by chaining him to the floor for extensive periods. King was found by psychiatrist Guy A. Parvaresh, M.D., to be incompetent because he was too mentally impaired to assist in his own defense. This opinion was confirmed by a second psychiatrist, Jerry K. Larsen, M.D., who found that

King suffered from paranoid ideation against his attorneys.

At a competency hearing held on May 31, 1994, King refused to address the court, remaining entirely silent at all times. King's appointed attorney indicated that he was prepared for a trial date to be set, which prompted the prosecutor immediately to take the position that King was withdrawing from his plea agreement. The court determined at the close of the hearing that although King suffered from a mental defect, he met the legal standard of competency to stand trial. The court's determination rested on the testimony of a government psychiatrist, Wesley Weissert, M.D., who stated that he had interviewed King for 30 minutes in March 1994 while King was at Oregon State Hospital. Weissert concluded that while King had organic personality syndrome as a result of his 1979

airplane crash, which had the effect of causing dramatic emotional turbulence that affected his judgment, this disease did not affect his memory or his ability to understand the procedures in court. The court then invited the prosecutor to file a motion seeking a judicial determination that the plea agreement was no longer in effect. Such a motion was filed on June 5, 1984, seeking a ruling that King had rescinded the agreement.

Despite a statement from one of King's attorneys that indicated that King was not prepared to make an intelligent decision on whether to pursue the plea agreement, the court subsequently issued an order ruling that King had breached and irrevocably rescinded the plea agreement by having requested a trial date.

King's petition for a writ of habeas corpus in the United States District Court for the District of Oregon raised

the issues presented by this brief, arguing that the failure of the state court to enforce the plea agreement was a violation of the fundamental fairness component of the due process clause of the fourteenth amendment. The petition argued that under the circumstances of the case it was not fair for the state to reap the benefits of King's full cooperation and testimony without fulfilling its obligation to allow King to plead guilty pursuant to the agreement. In addition, the petition argued that the state had waived its objections to King's failure to enter a guilty plea by using his testimony without insisting on a plea, that King did not have the mental capacity to intelligently withdraw from the plea bargain, that the plea agreement did not by its terms require the entering of the plea by a particular date or time (and indeed that the state had sought three

continuances), and that the state had not shown any prejudice permitting its refusal to allow enforcement of the plea.

REASON FOR GRANTING THE WRIT

In Ricketts v. Adamson, 483 U.S. 1, 16 (1987), Justice Brennan noted that "[t]his Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." This case presents the Court with the opportunity to do just that; the posture of this case gives the Court the chance to provide clear guidelines to the lower courts in this aspect of criminal law which has great national importance but which, in part because of the lack of clear direction from this Court, has been a subject of confusion and conflict among the lower courts.

A.

A critical issue in this case is whether the due process clause of the fourteenth amendment offers any protection to a defendant in the plea bargain process in a state prosecution if the defendant has not yet entered his guilty plea. The district court held that in the absence of a guilty plea a defendant who is seeking enforcement of a plea agreement enjoys no due process protections because he has not been constitutionally prejudiced by his inability to secure the enforcement of the agreement. According to the district court, because in this case King did not waive any of his constitutional rights as a consequence of a guilty plea, he was in the same position after the state's refusal to enforce the agreement as he would have been in the absence of an agreement. While acknowledging that in some cases

detrimental reliance upon an agreement by a defendant may require its enforcement, the district court found that such reliance may occur only in the limited situation in which the state directly uses information against the defendant at trial which was disclosed by the defendant pursuant to the terms of the agreement. For support for this conclusion, the court relied upon the holding in Mabry v. Johnson, 467 U.S. 504 (1984), in which this Court held that a defendant's acceptance of a plea bargain does not create a constitutional right to have the bargain specifically enforced if it is withdrawn by the prosecutor prior to acceptance of a guilty plea.

The reasoning of the district court has significant consequences for any criminal defendant who enters into an agreement with prosecutors or law enforcement officials. It is very common,

for example, for police and prosecutors to ask a defendant to cooperate in revealing the criminal activity of others. In the majority of situations, this type of agreement is entered into at an early stage of the prosecution against the defendant, long before a plea is to be formally entered. Typically the defendant will reach an agreement regarding his plea and then will immediately assist undercover law enforcement officials in uncovering further crimes, obtaining evidence of prior crimes, and revealing the identities of persons involved in those crimes. In these types of situations, the defendants may literally risk their lives by assisting the police. The risk is acceptable to these defendants solely because of the promises which have been made to them. Only after the defendants have cooperated and further arrests are made, however, do the defendants have the

opportunity to enter their pleas in accordance with these types of agreements.

If the courts were to take the position of the district court in this case, the message that would be sent to law enforcement agencies and criminal defendants is that the government simply does not have to fulfill its obligations under plea agreements if it has managed to get the defendants to do their part prior to pleading guilty. According to the district court's position, there is literally no constitutional impediment to subjecting a defendant to life-threatening risks, reaping the benefits of his undercover activity, and then treating the defendant as if no agreement had ever been reached.

Clearly, the approach taken by the district court was incorrect. In Mabry v. Johnson, supra, the Court was not presented with a situation in which a de-

fendant had acted in reliance upon the plea agreement. The facts in Mabry showed that the defendant in a state prosecution had been offered a particular sentence in exchange for his guilty plea to a lesser offense than the one originally charged, but the offer was withdrawn by the prosecutor the next day--after the prosecutor realized he had been too generous in his offer--before the defendant had entered his plea. On these facts, the Court found that there was no constitutional right to the enforcement of the agreement:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

467 U.S. at 507-08 (footnote omitted). Mabry is thus plainly distinguishable

from the present case, in which King performed his part of the bargain and suffered obvious detriment from his entering into the plea agreement.[3]

The district court's narrow interpretation of the applicability of due process protections in the plea bargaining process does find some support in the decisions of other courts which have taken literally the statement from Mabry that "[i]t is the ensuing guilty plea that implicates the Constitution." Id. at 508; see Stokes v. Armontrout, 851 F.2d 1085 (8th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) (state's withdrawal of offer for plea bargain on county

---

[3]As noted previously, King's decision to cooperate and testify for the state subjected him to death threats necessitating extraordinary security precautions by prison authorities, severe personal injury as a result of an attack by an inmate, tremendous prejudicial pretrial publicity in connection with his testimony, and prejudice relating to his actual testimony provided to the state.

capital murder charge, after defendant repudiated plea bargain agreement by refusing to plead guilty, did not violate Constitution despite fact that defendant's refusal to plead guilty was result of confusion caused by newspaper article erroneously reporting length of sentence incurred in city court plea entered the day before as part of agreement); United States v. Coon, 805 F.2d 822 (8th Cir. 1986) (parties discovered that maximum statutory fine was much higher than thought at time of entering plea agreement); People v. Navarroli, 121 Ill. 2d 516, 521 N.E.2d 891 (1988) (state's repudiation of plea agreement did not deprive defendant of constitutional right because defendant did not plead guilty in reliance on agreement; defendant had no right to enforcement despite fact that he acted as informant in various drug investigations pursuant to agreement).

Other courts are in conflict and disagree with this approach. For example, in United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983), the prosecutor promised the defendant in a drug case that he would not be prosecuted if he cooperated in an investigation of the person who sold the drugs. The defendant then contacted various individuals and arranged drug buys for government agents. Despite these actions, the government then refused to honor its agreement, citing the defendant's refusal to testify against the individuals, a condition which was not part of the original agreement. The court held that "under settled notions of fundamental fairness the government was bound to uphold its end of the bargain." Id. at 37. The court did not hold that the defendant could be tried as long as the government did not use his statements given after the agree-

ment was reached; rather, the court held that the indictment against the defendant had to be dismissed. See also Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982) (due process required the performance of an agreement between the prosecutor and the defendant by which the defendant agreed to testify against codefendants in exchange for immunity); Ex parte Yarber, 437 So. 2d 1330 (Ala. 1983) (holding that plea agreement should be enforced against state even where defendant has demonstrated no detrimental reliance); Commonwealth v. Reyes, 764 S.W.2d 62 (Ky. 1989) (because of due process right to fundamental fairness, prosecutor may not withdraw from immunity agreement after testimony was given by defendant pursuant to agreement); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976) (once the state chooses to make an agreement, it may not repudiate that agreement with impunity

after defendant has given information in deposition).

In fact, the district court's adherence to the factually distinct Mabry case was implicitly rejected by the Ninth Circuit in its review of this case. In essence, the Ninth Circuit ignored the district court's ruling, failing to address directly in any manner the question of whether a cognizable federal constitutional question had been presented. Rather, the Ninth Circuit, without explaining why it believed that it had jurisdiction over the resolution of the plea agreement dispute in the absence of a due process issue, affirmed the ruling of the district court without direct reference to the due process clause.[4]

---

[4]The court of appeals merely adopted the factual conclusions of the state court, noting that "[t]he factual findings of intentional rescission, competence, and prejudice to the state, are entitled to the presumption of correctness." King v. Brown, 8 F.3d 1403, 1409

The confusion and inconsistency in the approaches taken by the district court and the court of appeals in this case on this threshold issue exemplify the lack of clear standards pertaining to the role of due process in the resolution of disputes concerning plea agreements in which a plea of guilty has not formally been entered. This case therefore presents an important opportunity for this Court to resolve the confusion in the courts concerning this point and to make clear that, in appropriate cases in which fundamental fairness requires it, a defendant can have a due process right to the enforcement of his plea agreement even prior to the entry of his guilty plea.

(9th Cir. 1993). The error in this conclusion regarding the presumption of correctness for an issue which is clearly a combination of fact and law, rather than simply one of fact, is one basis for King's Petition for a Writ of Certiorari.

B.

This Court first touched on the need for consideration of fairness in the resolution of disputes concerning plea agreements in Santobello v. New York, 404 U.S. 257 (1971). Without direct reference to the due process clause,[5] the Court held that it would be unfair to uphold the guilty plea entered by the defendant where the facts showed that he had been promised by the prosecutor that no sentence recommendation would be made to the sentencing court, when in fact at sentencing the state urged the maximum punishment. In holding that the state was bound by the promise, the Court recognized that there must be "fairness in securing agreement between an accused and a prosecutor," id. at 261, and that

---

[5]That the decision in Santobello rested on federal constitutional principles is demonstrated by the fact that the Court reversed a state court judgment.

while "circumstances will vary," courts should ensure that the plea bargaining process is "attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances." Id. at 262.

Since the decision in Santobello, the Court has on occasion addressed issues arising out of plea agreements, but has not developed further the extent to which due process principles should govern the resolution of disputes concerning the enforcement of plea agreements. See Ricketts v. Adamson, supra (defendant's failure to comply with plea agreement by refusing to testify at codefendants' retrial as required in agreement removed double jeopardy bar to prosecution of defendant on original charges after defendant had been sentenced on lesser offense); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (due process clause is not

violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged); Blackledge v. Allison, 431 U.S. 63 (1977) (habeas corpus petitioner entitled to hearing or full opportunity to present relevant facts to determine whether his guilty plea was induced by unkept oral agreement which did not appear in written record).

Justice Brennan, speaking for the four dissenters in Ricketts v. Adamson, supra, urged a careful consideration of due process and plea bargains, noting that while principles of commercial contract law can be a useful point of departure in construing a plea agreement,

> commercial contract law can do no more than this, because plea

> agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

483 U.S. at 16.

This view has been echoed in a number of lower court decisions. For example, in Innes v. Dalsheim, 864 F.2d 974, 978 (2d Cir. 1988), the court stated: "Comparing a criminal defendant with a merchant in the marketplace is an inappropriate analogy that we have rejected. The law of commercial contracts plays only a limited role in resolving a plea dispute." See also United States v. Smith, 648 F. Supp. 495, 498 (S.D. Tex. 1986) ("Unlike contracts, Plea Bargains involve a myriad of collateral considera-

tions such as expectations of fundamental fairness by the Defendants, efficient administration of justice, and the integrity of the Government's promises"); Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979) ("The standards of the market place do not and should not govern the relationship between the government and a citizen").

On the other hand, other courts have minimized the importance of constitutional due process in the resolution of disputes concerning the enforcement of plea agreements. See, e.g., Stokes v. Armontrout, supra, 851 F.2d at 1089 ("The Supreme Court narrowed the broad 'fairness' guarantee of Santobello in Mabry v. Johnson"); United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993) ("Plea agreements are contractual in nature and are measured by contract law standards"). The Ninth Circuit opin-

ion in this case--which literally did not mention due process in its discussion of the plea agreement issue--clearly reflects the view that pure contract principles are adequate for sorting out what the parties to a plea bargain are entitled to under the circumstances.

The view that basic notions of fundamental fairness should inform commercial contract principles in the plea bargaining context is compelled by the obvious fact that the parties to such agreements simply do not come to the bargaining table in the same capacity as ordinary commercial parties. On the one hand, the defendant comes to the bargaining table in a weakened position. Accused of a crime, incarcerated, cut off from traditional sources of support, often ignorant of his rights, and perhaps only hastily counseled by an attorney, a criminal defendant is not likely to make

the same manner of decisions concerning his contract which would be expected of a party to a commercial contract.[6] On the other hand, the prosecutor comes to the negotiations with the full power of the government at his disposal.

Moreover, this Court has long recognized that a prosecutor is not simply the representative of one of two equal parties to a criminal proceeding, but rather occupies a special position by virtue of his authority as the representative of the government. As noted in Berger v. United States, 295 U.S. 78, 88 (1935), the government's "interest . . .

---

[6]For a particularly unfortunate example, see Stokes v. Armontrout, supra, in which the defendant's one-day hesitance to plead guilty to a reduced charge, based on his ignorance and his misunderstanding of what had transpired in a prior plea, cost him a concurrent sentence of imprisonment and ultimately resulted in his receiving the death penalty. See also Alschuler, "The Changing Plea Bargaining Debate," 69 Cal. L. Rev. 652 (1981).

in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court has thus found in a variety of contexts that in bringing a criminal prosecution the government's attorney has an overriding obligation to ensure that the proceedings are conducted with fairness and in conformity with due process. Berger v. United States, supra (improper statements of prosecutor at trial violated due process rights of defendant); Brady v. Maryland, 373 U.S. 83 (1963) (suppression of exculpatory evidence by prosecutor violates due process clause); United States v. Marion, 404 U.S. 307 (1971) (due process clause may provide basis for dismissing an indictment if the defense can show at trial that prosecutorial delay in bringing the accusation has prejudiced the right to fair trial); Santobello v. New York, supra; cf. Jacobson v. United States, 112

S. Ct. 1535 (1992) (due process precludes prosecution where government initiates crime by implanting disposition to commit crime in the mind of the defendant).

Because of the nature of a criminal prosecution and the attendant imbalance in the respective roles of the defendant and the government, it must be established by the Court that the ordinary rules of contracts are not totally dispositive in plea agreement disputes. Instead, in conformity with the Court's precedent in Santobello v. New York, supra, concepts of fundamental fairness must guide the courts in resolving such conflicts. As in any area, the application of due process principles is not necessarily simple or precise. The Court stated in Lassiter v. Department of Social Services, 452 U.S. 18, 24-25 (1981):

> Applying the Due Process Clause is . . . an uncertain

> enterprise which [requires that we] discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

What transpired in this case demonstrates in the extreme how the failure to incorporate basic due process principles into the decision-making processes of the courts below significantly altered the outcome of the case. A review of the Ninth Circuit's decision reveals that the court analyzed the plea agreement issue solely in terms of a commercial contract dispute. Moreover, the court simply adopted state court conclusions which similarly were reached with no consideration of due process. The court first simply deferred to the state court determination that King was "competent when he rescinded the plea agreement." King v. Brown, 8 F.3d 1403, 1408 (9th Cir. 1993). The court then adopted the state court

ruling that King had in fact rescinded his agreement, based on his statements regarding incarceration in Alabama, the request for a trial date, and his silence regarding his intention to plead guilty by a particular time set by the state. Id. at 1408. Quoting Ricketts v. Adamson, supra, 483 U.S. at 6 n.3, the court concluded that "'[t]he construction of a plea agreement in a state prosecution and the concomitant obligations flowing from it are, within broad bounds of reasonableness, matters of state law.'" King v. Brown, supra, 8 F.3d at 1408. In determining that the state court findings were within the bounds of reasonableness, however, the court of appeals looked solely to the Restatement (Second) of Contracts and not to the due process clause. Id. at 1409. In fact, the court explicitly disclaimed any effort to analyze the issue in due process terms:

"'[W]e cannot engage in 'second guessing the finding of breach' or substitute an independent federal interpretation[.]'" Id. (quoting Ricketts v. Adamson, supra, 483 U.S. at 6 n.3). The approach of the court--without any reliance on basic principles of fairness--skewed the results of the case. Moreover, even under basic contract principles, the court reached the wrong decision.

A proper analysis, under due process principles, would have highlighted these facts: King cooperated fully with the government in connection with his testimony against James Salter; King exposed himself to considerable personal risk by agreeing to cooperate; King was physically attacked and injured as a result of his testimony in conformity with the plea agreement; King exposed himself to extraordinary prejudicial pretrial publicity as a result of his testimony; the govern-

ment obtained evidence as a result of King's testimony; King incriminated himself by his testimony, regardless of whether the state directly used that testimony against him; King's hesitance to plead guilty took place at a time when he was suffering from considerable mental problems which necessitated a competency hearing;[7] although found by the trial court to be mentally competent for purposes of trial, King was assessed by the government's own psychiatric expert as having a mental defect which affected his

---

[7]While King's severe mental confusion was due in part to the fact that he was not taking his medication, this Court recently emphasized that the government has the strict obligation to provide inmates with adequate medical care. Hudson v. McMillan, 112 S. Ct. 995, 998 (1992). The State of Oregon did not fulfill this duty during the time in question, as its prison officials failed to insure that King received his proper medication. The state thus shares any responsibility for King's mental deterioration during this time when he was to plead guilty pursuant to the plea agreement.

ability to exercise proper judgment; King had no rational reason to fail to finalize the agreement by entering his plea, as he had literally nothing to gain by not pleading guilty, since the 10-year sentence to be served under the agreement was to be concurrent with his longer sentence in Washington; the plea agreement contained no provision requiring the guilty plea to be entered within a certain period of time; King was willing to plead guilty weeks prior to trial; and the prosecutor presented literally no evidence or proof of any harm to the government as a result of King's delay in pleading guilty. In short, the government received everything it expected from King under the bargain except his guilty plea by a certain date, a condition which was not even part of the agreement. The vague and unsubstantiated claims of prejudice allegedly suffered by the govern-

ment in awaiting his guilty plea were far outweighed by the very real detriment suffered by King and by the tremendously unfair outcome of requiring King to go to trial after having fully cooperated with the government. Plainly, the state could not have been prejudiced by the short delay that resulted from King's decision whether to plead guilty. The concerns asserted by the government--expenses, scheduling difficulties, out-of-state witnesses--were essentially frivolous and did not relate to the short time period attributable to King's actions, but rather to the entire period of time King's trial was pending--including the period during which the trial was continued so that King could testify for the state. Moreover, it is obvious that all of the state's concerns regarding the difficulty and expense of trial preparation, which were directed at the goal of

convicting King, would have been eliminated simply by accepting King's guilty plea. The only logical explanation for the state's action was its desire to save face by putting King to a public trial after having lost the Salter case.

As noted above, the state courts and the Ninth Circuit focused on two actions by King which supposedly indicated an intention not to perform the remainder of his part of the agreement and thus were found to be a repudiation of the contract after only partial performance, excusing the government from complying with the agreement. Even under basic contract principles, these actions could not support a finding of repudiation. First, King was said to have told a district attorney in February 1984 that he would not plead guilty "unless he got more than he had bargained for--he wanted Alabama incarceration, in addition to ten year

parole eligibility and concurrent sentence." King v. Brown, supra, 8 F.3d at 1409. According to the court of appeals,

> [h]is repudiation was not a casual remark taken advantage of by a prosecutor eager to escape performance--he was brought into court, with counsel, and the matter was carefully reviewed in a context which gave King an opportunity to clarify his intention to adhere to the plea bargain, had that been his intention. King's repudiation of his agreement excused the government's failure to perform its part of the bargain.

Id. The court of appeals failed to note, however, that King's lengthy three-day testimony in Salter's trial came after this statement, which obviously showed that the state could not have possibly considered the statement a repudiation of the agreement. In short, the state was perfectly comfortable in giving the statement no significance when that position benefited the state, but later claiming the statement was a repudiation

when that contrary position benefited the state.

Second, the court of appeals found it of crucial significance that King had asked for a trial date and stood silent when asked if he intended to plead guilty. According to the court of appeals, this too was a repudiation of the agreement. However, as was emphasized in the dissenting opinion of Judge Pregerson, the agreement did not contain a requirement that King plead guilty by any particular date, and it was the state's attempt to graft such a provision onto the agreement that deviated from the agreement. Id. at 1414. It is well accepted even under plain contract principles that any ambiguity or uncertainty in a plea agreement is to be construed against the government. E.g., United States v. Harvey, 791 F.2d 294, 300-01 (4th Cir. 1986) (both constitutional and

supervisory concerns require holding the government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements); United States v. Garcia, 956 F.2d 41 (4th Cir. 1992) (same). Even more important, it is not at all unusual for the government to draft a plea agreement with a set date by which the plea must be entered. E.g., United States v. Mozer, 828 F. Supp. 208 (S.D.N.Y. 1993) (plea agreement provided that government would accept plea "no later than December 3, 1992"). Had the state felt a plea was essential at a particular time prior to trial in this case, it could have so provided in the terms of the agreement. However, it chose not to include such a term, and it could not later attempt to alter the agreement by insisting on a plea by a particular date.

Under an appropriate due process analysis, these supposedly critical two actions by King would be just part of the equation in determining the appropriate resolution of this conflict. Examining the totality of the circumstances, including King's weakened mental state at the time of his indecision regarding the guilty plea and "assessing the several interests that are at stake," Lassiter v. Department of Social Services, supra, 452 U.S. at 24-25, the courts below would no doubt have reached a result more in conformity with fundamental fairness than one dictated by a selective application of the Restatement (Second) of Contracts.

The requirements of fundamental fairness have not been served in this case, and the National Association of Criminal Defense Lawyers submits that in order to rectify the injustice in this case and to prevent similar situations

involving other defendants in the future the Court should review the decision below.

CONCLUSION

For all of the foregoing reasons, the Georgia Criminal Defense Lawyers Association requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

BOBBY LEE COOK
(Counsel for the Georgia
Criminal Defense
Lawyers Association)
Cook & Palmour
126 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

July 11, 1994 Counsel of Record

Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE ALABAMA DISABILITIES ADVOCACY PROGRAM AND THE SOUTHERN POVERTY LAW CENTER AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

Ruben W. Cook
Alabama Disabilities
Advocacy Program
University of Alabama
School of Law
Box 870395
Tuscaloosa, AL 35487
(205) 348-3909

Morris Dees*
Southern Poverty Law
Center
Post Office Box 2007
Montgomery, AL 36102
(205) 264-0286

July 11, 1994

*Counsel of Record

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE ALABAMA DISABILITIES ADVOCACY PROGRAM AND THE SOUTHERN POVERTY LAW CENTER AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

Ruben W. Cook
Alabama Disabilities
Advocacy Program
University of Alabama
School of Law
Box 870395
Tuscaloosa, AL 35487
(205) 348-3909

Morris Dees*
Southern Poverty Law
Center
Post Office Box 2007
Montgomery, AL 36102
(205) 264-0286

July 11, 1994

*Counsel of Record

ISSUE ADDRESSED BY THE AMICI CURIAE

Did the court of appeals err by failing to make an independent review of the state trial court's competency determination, thus upholding in a habeas corpus proceeding the state court's application of an unconstitutional standard for determining competency?

TABLE OF CONTENTS

	Page
ISSUE ADDRESSED BY THE AMICI CURIAE	i
TABLE OF CONTENTS	ii
TABLE OF CASES	iii
INTEREST OF THE AMICI CURIAE	1
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	13

TABLE OF CASES

Cases	Page
Drope v. Pape, 420 U.S. 162 (1975)	6
Dusky v. United States, 362 U.S. 402 (1960)	8, 11
Faretta v. California, 422 U.S. 806 (1975)	7
Godinez v. Moran, 113 S. Ct. 2680 (1993)	7, 8
Hudson v. McMillan, 112 S. Ct. 995 (1992)	4
Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, 112 S. Ct. 1942 (1992)	11
Pate v. Robinson, 383 U.S. 375 (1966)	6
Townsend v. Sain, 372 U.S. 293 (1963)	12
United States v. Hensi, 901 F.2d 293 (2d Cir. 1990)	11
Statutes	
Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 42 U.S.C. § 6000 (1983)	1
Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 42 U.S.C. § 10801 (Cum. Supp. 1994)	1
Sup. Ct. R. 37.2	3
Other	
4 W. Blackstone, Commentaries *24	6

INTEREST OF THE AMICI CURIAE

The Alabama Disabilities Advocacy Program (ADAP) is the protection and advocacy system for the State of Alabama established pursuant to federal law to protect and advocate for persons with disabilities. ADAP is a part of the University of Alabama School of Law's Clinical Law Programs, and administers three primary programs.

The Protection and Advocacy for Persons with Developmental Disabilities (PADD) Program is established pursuant to the Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 42 U.S.C. § 6000 (1983). This program advocates on behalf of individuals who have severe, chronic disabilities which are manifested in the person's life prior to age 22.

The Protection and Advocacy for Individuals with Mental Illness (PAIMI) Program is established pursuant to the Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 42 U.S.C. § 10801 (Cum. Supp. 1994). This program advocates on behalf of individuals who have a diag-

nosis of mental illness and who are residents of 24-hour treatment facilities, or who are within 90 days of release from such facilities.

The Protection and Advocacy of Individual Rights (PAIR) Program is established pursuant to the Rehabilitation Act. This program has authority to protect and advocate for services to persons with disabilities who are not eligible for services through the PADD or PAIMI programs.

Under its federal legislation, ADAP is authorized to pursue legal, administrative, and other appropriate remedies to protect and advocate for the rights of persons with disabilities. Among ADAP's stated objectives is advocacy for appropriate treatment and services for persons with disabilities in the criminal justice system.

ADAP has examined this case and determined that several of the issues presented are of such importance to persons with mental illness who are criminal defendants that ADAP should offer its assistance to the Court.

The Southern Poverty Law Center, a nonprofit organization with 330,000 members, was founded to promote justice and tolerance through litigation and education. The Southern Poverty Law Center has been involved in a number of cases concerning the rights of defendants with mental illness. It shares the views of the ADAP regarding this case, and urges this Court to consider fully the important issues raised by the Petition for Certiorari.[1]

REASONS FOR GRANTING THE WRIT

1. The Petitioner in this case, Robert Haden King Jr., lived a life free of controversy until suffering serious head injuries, brain damage, and permanent neurological problems as a result of an airplane crash in 1979. The mental illness induced by the injuries suffered in this airplane accident caused dramatic behavioral changes in King which led to his legal difficulties. Most significantly for the purposes of the Court's

---

[1]Pursuant to Rule 37.2 of this Court, both the Petitioner and the Respondent have consented to the participation of the amici curiae, and letters of consent are being filed with the Court.

consideration of this case, King's mental illness precluded him from acting rationally at the time that the State of Oregon was acting to prevent him from reaping the benefits of his plea bargain.

The record in this case reveals that the state did not fulfill its obligation under Hudson v. McMillan, 112 S. Ct. 995 (1992), to provide King with adequate medical care. Oregon authorities were well aware of King's mental illness; indeed, he was physically arrested for the Oregon charge while an inpatient at Fairfax Mental Hospital in Seattle, Washington. King's doctors had advised that his mental illness be treated with four prescription medications: Dilantin, Haldol, Tegretol, and Lithium. However, because of the pressures of his situation, including the death threats against him, while in custody in Oregon, King had not been taking his medication as directed. Contrary to their duty under Hudson v. McMillan, prison authorities did not insure that King was properly medicated, and therefore his mental condition worsened. Moreover, following King's suicide attempt on March 10, 1984, during which he was found hanging uncon-

scious in his cell, King was chained to the floor of his cell for three days in a spread-eagle position.

The Alabama Disabilities Advocacy Program and the Southern Poverty Law Center submit that this case presents as clear a case as could possibly be brought to this Court of how a prosecutor took advantage of a mentally ill defendant, and how the state courts did not compel the evaluation of King's mental competency under the standard dictated by the requirements of due process. The lack of meaningful review by the Ninth Circuit, through its decision to defer to the trial court's competency determination without any independent review of that determination, provides this Court with a compelling opportunity to enunciate clearly the need for a federal court in a habeas corpus action to treat the issue of mental competency as a legal issue requiring independent review to ensure that a state has applied the constitutionally mandated standard of competency.

In light of the egregious facts of this case and the need to preserve the threshold level of competency required to permit criminal prosecution of a defend-

ant, this Court should review the decision of the court below.

2. The competency doctrine has a long, venerable legacy and finds its roots in seventeenth century England. The common law found it necessary and proper to protect those who had become "mad" from judgment, prosecution, and even arraignment. See 4 W. Blackstone, Commentaries *24. This Court has recognized that the prohibition against proceeding against the incompetent is "fundamental to an adversary system of justice," Drope v. Pape, 420 U.S. 162, 172 (1975), and that "conviction of [the] legally incompetent violates due process." Pate v. Robinson, 383 U.S. 375, 378 (1966).

The protection of the incompetent and the concomitant requirement of competency for participation in the judicial process, including standing trial or deciding to waive constitutional rights before trial, promotes important societal and individual interests. Among other things, the criminal process maintains its moral dignity, decorum in trial proceedings is preserved, and the public is assured that possible erro-

neous convictions have been avoided and that the outcomes produced by the criminal system are reliable and subject to respect.

In addition, the autonomy of the individual, central to much of Western ethical and political theory, is preserved. See Faretta v. California, 422 U.S. 806, 834 (1975) ("respect for the individual . . . is the lifeblood of the law"). By requiring competency, the defendant is ensured fair treatment and is permitted to control the conduct of his defense. The purposes of punishment also are served because only the competent are subjected to judgment. The public receives retribution for the convicted's criminal acts while being deterred from engaging in like criminal conduct, whereas the convicted is rehabilitated. Those who are incompetent, on the other hand, receive treatment for their mental conditions with the hope of rendering them competent.

As this Court noted most recently in Godinez v. Moran, 113 S. Ct. 2680, 2688 (1993), the due process clause imposes a constitutional burden on the states to ensure that the individuals accused of crime are competent to proceed. In addition, the due process

clause establishes a threshold standard for competency. See Dusky v. United States, 362 U.S. 402 (1960) (per curiam). In order to maintain the viability of the competency doctrine and to ensure that its worthwhile purposes are fostered, the federal courts on habeas review must vigilantly require the states to observe this threshold standard for competency.

3. In Godinez v. Moran, supra, a review of a habeas corpus action, this Court concluded that a defendant pleading guilty or waiving the right to counsel must meet the standard set forth in Dusky v. United States, supra. In Dusky, the Court found that it was not enough for a trial court to find that the defendant was "oriented to time and place and [has] some recollection of events." 362 U.S. at 402. Rather, the Court concluded, the appropriate standard is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." Id.

The record of this case demonstrates that the Oregon trial court did not attempt to satisfy this stand-

ard, and did not make the factual inquiries necessary to reach a reasoned conclusion regarding the competency of King. In fact, the trial court merely concluded that King was able to "understand the nature of the proceedings" and was "able to participate in his defense" (Petition for a Writ of Certiorari at 14). The competency hearing took place without any active participation by King, who remained entirely silent throughout the proceeding. King was represented by an appointed attorney, with whom King was not cooperating.[2] The trial court concluded that while King suffered from a "mental defect" and engaged in behavior which was "bizarre," he was "able to aid and assist in his own defense and cooperate with his counsel," was "able to understand the nature of the proceedings against him," and was "able to participate in his own defense" (Petition for a Writ of Certiorari, Appendix G at 55a-56a).

---

[2]Jerry K. Larsen, M.D., a psychiatrist who examined King shortly before the hearing, found that King suffered from paranoid ideation against his attorneys, which resulted in his refusal to cooperate with his attorneys (See Petition for a Writ of Certiorari, Appendix H at 61a).

The factual support for these conclusions was suspect. The court's determination rested solely on the testimony of a state psychiatrist, Wesley Weissert, M.D., who was found to have made numerous misrepresentations to the court during the course of his testimony[3] (Exh. 119 at 501-02). Weissert informed the court that he had interviewed King for 30 minutes several months earlier while King was hospitalized at Oregon State Hospital. However, as noted above, the significant fact concerning the trial court's conclusions was that the court never addressed the requirement that King be shown to have a rational understanding of the proceedings, as opposed to a mere factual understanding. In addition, there was no conclusion by the trial court that King could rationally consult with his attorney. Indeed, the actions of King in the time period leading up to the trial court's competency determination can only be characterized as irrational, from his behavior in the courtroom to the very fact of

---

[3]Weissert's misrepresentations concerning the diagnosis and treatment of King drew a rebuke from the court: "I am not complimentary of Dr. Weissert's way that he handled this, Mr. Lyons. I agree with you. I certainly don't think that is a pattern of how these matters should be handled" (Exh. 119 at 518).

his indecision concerning whether to enter his guilty plea.

The distinction between the standard utilized by the Oregon trial court and the standard mandated by Dusky is material. Indeed, the Dusky case itself involved the reversal of a conviction based on a factual showing that in finding the defendant competent the trial court had relied simply on evidence showing that the defendant was able to understand the charges against him and was able to assist his attorney by providing information concerning himself. In Lafferty v. Cook, 949 F.2d 1546, 1551 (10th Cir. 1991), cert. denied, 112 S. Ct. 1942 (1992), the court described the rationality component of the Dusky standard as requiring a finding of incompetence "if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." The court in Lafferty found reversible error in a state trial court competency determination which, as in the present case, concluded that the defendant had an intellectual understanding of the proceedings but which omitted any finding that the defendant could rationally perceive and appreciate the

true meaning of what was transpiring. See also United States v. Hensi, 901 F.2d 293 (2d Cir. 1990) (defendant had intellectual understanding of charges against him, but his impaired sense of reality substantially undermined his judgment and prevented him from cooperating rationally with his lawyer).

This case demonstrates the need for this Court to clarify the point that competency determinations are mixed questions of law and fact requiring independent review,[4] and highlights the need for federal evidentiary hearings in habeas corpus proceedings in accordance with the principles set forth in Townsend v. Sain, 372 U.S. 293 (1963).

---

[4](See Petition for a Writ of Certiorari at 12-13 (for a discussion of the split in the circuits on this issue).)

CONCLUSION

The Alabama Disabilities Advocacy Program and the Southern Poverty Law Center join in urging this Court to grant the Petition for a Writ of Certiorari submitted by Petitioner Robert Haden King Jr.

Respectfully submitted,

Ruben W. Cook
Alabama Disabilities
Advocacy Program
University of Alabama
School of Law
Box 870395
Tuscaloosa, AL 35487
(205) 348-3909

Morris Dees*
Southern Poverty Law
Center
Post Office Box 2007
Montgomery, AL 36102
(205) 264-0286

*Counsel of Record

July 11, 1994

(6)

Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION and the OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

L. BRANCH S. CONNELLY*
(Counsel to the National Association
of Criminal Defense Lawyers)
128 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

THOMAS M. GOGGANS
(Counsel to the Alabama Criminal
Defense Lawyers Association)
Suite 205, 770 South McDonough Street
Montgomery, Alabama 36104
(205) 834-2511

LAURA GRASER
(Counsel to the Oregon Criminal
Defense Lawyers Association)
Post Office Box 12441
Portland, Oregon 97212
(503) 287-7036

July 11, 1994 *Counsel of Record

27 pp

No. 93-1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

ROBERT HADEN KING JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT
OF THE CLALLAM BAY CORRECTIONS CENTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION and the OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

L. BRANCH S. CONNELLY*
(Counsel to the National Association
of Criminal Defense Lawyers)
128 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

THOMAS M. GOGGANS
(Counsel to the Alabama Criminal
Defense Lawyers Association)
Suite 205, 770 South McDonough Street
Montgomery, Alabama 36104
(205) 834-2511

LAURA GRASER
(Counsel to the Oregon Criminal
Defense Lawyers Association)
Post Office Box 12441
Portland, Oregon 97212
(503) 287-7036

July 11, 1994 *Counsel of Record

ISSUE ADDRESSED BY THE AMICI CURIAE

May the strict time limits of the Interstate Agreement on Detainers be extended by the state's need to obtain a superseding indictment following the dismissal of an indictment which was unconstitutionally obtained?

TABLE OF CONTENTS

	Page
ISSUE ADDRESSED BY THE AMICI CURIAE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
REASON FOR GRANTING THE WRIT	
THIS CASE PRESENTS IMPORTANT ISSUES PERTAINING TO THE INTERSTATE AGREEMENT ON DETAINERS WHICH SHOULD BE ADDRESSED BY THE COURT	4
CONCLUSION	19

TABLE OF AUTHORITIES

Cases **Page**

Birdwell v. Skeen, 983 F.2d 1332 (5th Cir. 1993) 14, 17

Carchman v. Nash, 473 U.S. 716 (1984) 7, 11

King v. Brown, 8 F.3d 1403 (9th Cir. 1993) 17

Malinski v. New York, 324 U.S. 401 (1945) 18

People v. C'Allah, 100 A.D.2d 754, 474 N.Y.S.2d 305 (1984) 15

Reed v. Farley, No. 93-5418 (U.S. 1994) 4, 20

Smith v. Hooey, 393 U.S. 374 (1969) 11

State v. Shaw, 98 N.M. 580, 651 P.2d 115 (1982) 15

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978) 12

United States v. Cephus, 937 F.2d 816 (2d Cir. 1991), cert. denied, 112 S. Ct. 884 (1992) 14

United States v. Ford, 550 F.2d 732 (2d Cir. 1977) 9, 14

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
United States v. Glasgow, 790 F.2d 446 (6th Cir. 1985), cert. denied, 475 U.S. 1124 (1986)	16
United States v. Mauro, 436 U.S. 340 (1977)	8
Statutes	
18 U.S.C. app. § 2	7
28 U.S.C. § 2254	4
Commissioner's Prefact to Uniform Mandatory Disposition of Detainers Act, 9B U.L.A. 363 (1966)	10
Sup. Ct. R. 37.2	3

INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over 25 years ago to promote the proper administration of the criminal justice system, the protection of individual rights, and the advancement of knowledge in the area of criminal defense law. After reviewing the record of this case, NACDL has concluded that it presents issues of such significance that NACDL should urge this Court to grant the Petition for a Writ of Certiorari.

The Alabama Criminal Defense Lawyers Association (ACDLA) is a nonprofit corporation with a membership of over 270 lawyers. ACDLA was founded in 1981. Among ACDLA's stated objectives are the protection of individual rights in criminal

cases and the promotion of the proper administration of criminal justice. The issues in this case are of such importance to criminal defense lawyers and criminal defendants throughout the nation that ACDLA believes it should offer its assistance to the Court.

The Oregon Criminal Defense Lawyers Association (OCDLA) is an Oregon non-profit corporation with a membership of more than 850 lawyers, legal workers, and law students throughout the State of Oregon. The purpose of the OCDLA is to provide and to promote scholarship in the area of legal representation in criminal, juvenile, and mental commitment proceedings; to promote public awareness as to the function and duties of the criminal defense bar; and to promote the integrity of the adversary system, as characterized by strongly independent and competent components of the judiciary and the bar.

Among OCDLA's stated objectives is the promotion of the proper administration of criminal justice.

Consequently, OCDLA concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The OCDLA believes strongly that the issues presented in this case must be addressed by this Court and offers its assistance in highlighting the particular need for clarification of the importance of the strict time limits contained in the Interstate Agreement on Detainers.[1]

---

[1]Pursuant to Rule 37.2 of this Court, both the Petitioner and the Respondent have consented to the participation of the amici curiae, and letters of consent are being filed with the Court.

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT ISSUES PERTAINING TO THE INTER-STATE AGREEMENT ON DETAINERS WHICH SHOULD BE ADDRESSED BY THE COURT.

On June 20, 1994, this Court issued its decision in the case of Reed v. Farley, No. 93-5418 (U.S. 1994). In the opinion written by Justice Ginsberg, in which Justices Rehnquist and O'Conner joined, the Court ruled narrowly that a state court's failure to observe the 120-day speedy trial provision contained in Article IV(c) of the Interstate Agreement on Detainers (IAD) is not cognizable under 28 U.S.C. § 2254 when the defendant made no objection to the trial date at the time that it was set. The Court did not resolve the question of whether the same rule would apply to a defendant who did in fact make a timely request based

on the IAD's speedy trial provisions.[2] Justice Ginsburg's opinion, and the concurrence authored by Justice Scalia, in many respects appears inconsistent with the intent of Congress and a number of prior decisions of this Court, which indicate that the speedy trial provisions of the IAD are essential to effectuate the underlying purpose of that Act.

The third question presented in the petition in this case, whether a superseding indictment may toll the IAD's speedy trial deadlines, turns on the extent to which the IAD's speedy trial provisions are in fact essential to the Act and must therefore be strictly enforced. Accordingly, this case provides the Court with an excellent opportunity to resolve

---

[2]Justice Ginsburg concluded her opinion by stating that "we have reserved the question whether federal habeas review is available to check violations of the IAD's speedy trial prescriptions when the state court disregards timely pleas for their application." Slip op. at 16.

the tension between the language of Reed and the holdings of various earlier decisions of this Court and immediately to provide the lower courts with guidance on this important issue (see Petitioner's Supplemental Memorandum of Authority at 3). The amici submit this brief to emphasize the importance of this issue and to highlight the inconsistencies between the Ninth Circuit's holding and the holdings of numerous other courts.

The IAD's policy statement provides in pertinent part:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditions and orderly disposition of such charges and determination of the proper status of any and

> all detainers based on untried indictments, informations, or complaints.

18 U.S.C. app. § 2. The courts which have carefully examined the origins of the IAD have concurred in the conclusion that it was drafted in response to a number of serious problems which arose out of an unregulated system of detainers used by states which had charges pending against prisoners held in other jurisdictions. This Court found in Carchman v. Nash, 473 U.S. 716, 720 (1984), for example, that the difficulties imposed upon prisoners by the lack of regulation of the use of detainers made some form of uniform legislation necessary:

> "The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for

> parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated." Council of State Governments, Suggested State Legislation, Program for 1957, p. 74 (1956).

Similarly, this Court stated in United States v. Mauro, 436 U.S. 340, 353 (1977), that when the IAD legislation was introduced in Congress, both the House and Senate Reports noted the compelling need for the legislation:

> "The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve

> his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing." H. R. Rep. No. 91-1018, p. 3 (1970); S. Rep. No. 91-1356, p. 3 (1970).

In addition to these significant problems created by the existence of a detainer lodged by another jurisdiction, a prisoner subject to a detainer was unduly prejudiced by the delay in preparing for trial on the charge for which the detainer had been lodged. As noted in United States v. Ford, 550 F.2d 732, 740 (2d Cir. 1977), as in all cases of trial delay, a prisoner under an indefinite detainer faced the prospect that witnesses might die, evidence disappear, and memories fade. While the state could gather its evidence and preserve it for an eventual trial, the prisoner--confined in another jurisdiction--was often unable

to do so, especially if he could not afford an attorney.

The abuses inherent in the unregulated use of detainers were well documented. Despite the many hardships suffered by prisoners subject to a detainer, as many as 50% of all detainers were allowed to lapse without any attempt at prosecution by the jurisdiction that had filed the detainer. Id. at 738 (citing Commissioner's Prefact to Uniform Mandatory Disposition of Detainers Act, 9B U.L.A. 363, 364 (1966)). The unfairness inherent in such a system eventually led to the recognition among the states that something had to be done to protect the speedy trial rights of prisoners subject to detainers.

These concerns resulted in the speedy trial provisions contained in the

IAD.[3] Article III of the IAD provides that a prisoner has the right to be brought to trial within 180 days after he requests final disposition of an indictment, information, or complaint for which a detainer has been lodged by another jurisdiction. In addition, Article IV sets forth a 120-day limit for the start of a trial once the prisoner has been transferred to the receiving state. Article V(c) provides unequivocally that the indictment on the basis of which the detainer has been lodged shall be dismissed with prejudice if the prisoner is

---

[3]The Court noted in Carchman v. Nash, supra, that the legislative history of the adoption of the IAD by Congress in 1970 demonstrates that a motivating factor for congressional action was the need to vindicate a prisoner's constitutional right to a speedy trial, in conformity with this Court's ruling in Smith v. Hooey, 393 U.S. 374 (1969), which held that the sixth amendment entitles a prisoner in a federal penitentiary who is subject to pending state criminal charges to have the state, upon demand, make a diligent, good-faith effort to bring him to trial within a reasonable time.

not brought to trial within the 120-day period. The only tolling features in the IAD are contained in Article IV(c), which excepts adherence to the limitation periods as follows: "for good cause shown in open court . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance." The sanction of dismissal with prejudice clearly evidences congressional intent that IAD speedy trial violations are of the highest importance.

With this background in mind, the courts which have construed the speedy trial provisions of the IAD have consistently concluded that these provisions are for the protection of the prisoners and must be strictly construed to effectuate their purpose. For example, in Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), which arose from a habeas proceeding, the court held that the dis-

trict court erred in finding that there had been "good cause" under Article IV(c) for the delay in the defendant's trial beyond the 120-day limit simply on the basis of the conclusion that the defendant was probably unable to stand trial. Rejecting the contention that there had been an informal agreement by the parties to postpone the defendant's murder trial because it was to follow closely another trial of the defendant, the court of appeals concluded that the tolling provision of the IAD could not be so easily invoked on behalf of the state:

> We believe that Art. VI was written as a protective measure for a transferred prisoner. It cannot appropriately be turned from a shield for the defendant into a sword for the prosecution.

Id. at 838. The court further emphasized that the IAD "was written with meticulous care" and that it was contemplated that a state's failure to adhere closely to its

provisions might have "harsh effects" on a state. Id. at 840.

Similarly, in United States v. Ford, supra, 550 F.2d at 741, the Second Circuit noted that any interpretation of the IAD should reflect Congress's purpose, as reflected by the legislative history, of providing a speedy disposition of trials by states which lodge detainers. In Ford, the court concluded that the defendant's rights under the IAD were violated, necessitating the reversal of his conviction, when he was not brought to trial within 120 days because of a delay caused by a congested court docket. See also United States v. Cephus, 937 F.2d 816 (2d Cir. 1991), cert. denied, 112 S. Ct. 884 (1992) (government cannot launch detainer against defendant and then throw out clock every time it dismisses charges, only to start clock anew by bringing new set of charges); Birdwell v.

Skeen, 983 F.2d 1332 (5th Cir. 1993) (a continuance which is granted to allow a party to ascertain whether testimony is necessary for a dismissal hearing is not based upon "good cause" when the party requesting the continuance could have made that determination prior to the hearing by using reasonable diligence); People v. C'Allah, 100 A.D.2d 754, 474 N.Y.S.2d 305 (1984) (state may not avoid operation of time limitations prescribed in the IAD simply by the expedient of procuring another indictment, whether it arises out of the discovery of new evidence or otherwise); State v. Shaw, 98 N.M. 580, 651 P.2d 115 (1982) (state may not avoid time limitations of IAD by filing second indictment).

A brief review of the facts in this case demonstrates that the Ninth Circuit decision simply cannot be squared with the principles and holdings of the cases

discussed above. King was transferred to Oregon pursuant to a detainer which was based on an indictment which was knowingly and fraudulently obtained in violation of the Oregon Constitution. This indictment was subsequently dismissed, leaving King in custody under a detainer for which there was no pending indictment[4] and causing Oregon authorities to seek and obtain--over the objection of King on IAD grounds--a 30-day continuance to permit another indictment to be returned. The granting of this continuance put the state beyond the 120-day limit set forth in Article IV of the IAD. The trial court found that this need to obtain a

---

[4]In the absence of a valid indictment, the detainer which gave Oregon jurisdiction over King was a nullity, rendering his continued custody in Oregon violative of the IAD. See United States v. Glasgow, 790 F.2d 446 (6th Cir. 1985), cert. denied, 475 U.S. 1124 (1986) (the dismissal of a pending charge voids the detainer arising out of the charge).

second indictment was "good cause" for delay under Article IV(c).

As was held by the Fifth Circuit in Birdwell v. Skeen, supra, a "good cause" determination under Article IV(c) may not rest on a continuance request which itself was not reasonable. In this case, it is not questioned that the need for the continuance at issue could have been avoided by "reasonable diligence," 983 F.2d at 1340, as the very need for a superseding indictment was generated by the patently unreasonable action of the state in obtaining the original indictment in a knowingly illegal manner. Although the Ninth Circuit was comfortable with the finding that the first indictment was "technically defective," King v. Brown, 8 F.3d 1403, 1410 (9th Cir. 1993), and with the reasonableness of the state's need to get a continuance to permit reindictment, the amici submit that

permitting a state to evade the plain time limit requirements of the IAD, established for the protection of prisoners, solely for the purpose of allowing the state to correct its own manifestly unconstitutional action flies in the face of all that the IAD represents and is inconsistent with all of the decisions interpreting the IAD. The Ninth Circuit opinion thus has created a conflict with the other circuits and with state courts on this important federal issue which must be resolved by the Court.

In addressing this issue, the Court should recall the words of Justice Frankfurter in Malinski v. New York, 324 U.S. 401, 413-14 (1945), in which he emphasized the basis for the requirement that the laws be enforced in strict accordance with the procedures which they contain:

> "The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-

> speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure."

(Emphasis added.) The history leading up to the enactment of the IAD reveals that the procedures contained in the legislation were created for the benefit of the prisoners affected by detainers, and not for the convenience of the prosecution, and were intended to be strictly followed. The Ninth Circuit's casual disregarding of this fact and its holding that the need to reindict King was good cause to extend the strict 120-day time limit for trial cannot be allowed to stand by this Court.

CONCLUSION

The Petition for a Writ of Certiorari filed by King offers the Court the opportunity to revisit and reconsider the

issue addressed in Reed v. Farley, supra, in a case in which a timely IAD speedy trial objection was made. Moreover, this case presents the chance for the Court to articulate more clearly the importance of the speedy trial protections offered by the IAD and, more specifically, to establish that a state's own knowingly illegal actions cannot constitute good cause to extend the speedy trial limitations. Accordingly, the amici urge the Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

L. BRANCH S. CONNELLY*
(Counsel to the National
Association of Criminal
Defense Lawyers)
128 South Commerce Street
Summerville, Georgia 30747
(706) 857-3421

*Counsel of Record

THOMAS M. GOGGANS
(Counsel to the Alabama
Criminal Defense Lawyers
Association)
Suite 205
770 South McDonough Street
Montgomery, Alabama 36104
(205) 834-2511

LAURA GRASER
(Counsel to the Oregon
Criminal Defense Lawyers
Association)
Post Office Box 12441
Portland, Oregon 97212
(503) 287-7036

July 11, 1994

Supreme Court, U.S.
FILED
SEP 20 1994
OFFICE OF THE CLERK

No. 93-1975

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

September 20, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

10 pp

TABLE OF AUTHORITIES

CASES	Page
Dusky v. *United States*, 362 U.S. 402 (1960)	1
Reed v. *Farley*, 114 S. Ct. 2291 (1994)	2
State v. *Conger*, 319 Or. 484, 1994 WL 421381 (Or. 1994)	6
State v. *Gortmaker*, 655 P.2d 575 (Or. Ct. App. 1982), *aff'd*, 668 P.2d 354 (Or. 1983), *cert. denied*, 465 U.S. 1066 (1984)	7
Townsend v. *Sain*, 372 U.S. 293 (1963)	3
STATUTES	
28 U.S.C. § 2254	1, 2
OTHER AUTHORITY	
Rule 8(a) & Advisory Committee Note, Rules Governing Section 2254 Cases in the United States District Courts	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1975

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

In his petition, petitioner Robert Haden King, Jr., demonstrated that (1) the Ninth Circuit's divided holding in the case below that the state court's determination of competency was a finding of fact entitled to the "presumption of correctness" under 28 U.S.C. § 2254(d) is in conflict with the holdings of at least three other courts of appeals and with the principles enunciated by this Court in *Dusky* v. *United States*, 362 U.S. 402 (1960); (2) the Ninth Circuit majority incorrectly applied the burden of proof provided by the "presumption of correctness" to petitioner's habeas claims before he had had the opportunity to present the merits of those claims in an evidentiary hearing before the district court; and (3) the Ninth Circuit's divided holding that a superseding indictment extended the deadline of the Interstate Agreement on Detainers' ("IAD") speedy trial provision

conflicts with the decisions of all courts addressing the issue.

Pursuant to an order of this Court, respondent filed a brief in opposition. The brief is striking primarily for what it does not dispute. Respondent does not contest the fundamental importance to criminal justice of this case, *cf. Amicus Curiae* Brief of the Ga. Criminal Defense Lawyers Ass'n at 3-5 ("[t]he impact of decisions such as the Ninth Circuit's on the criminal justice system cannot be overstated"); nor does he deny that the Ninth Circuit majority has rendered the writ of habeas corpus a total nullity by depriving petitioner of the opportunity to develop and present his claims in a federal forum as provided by 28 U.S.C. § 2254. Respondent further agrees that "any case that presents a valid issue regarding the IAD" would be an appropriate vehicle for this Court to address the question left open in its decision in *Reed* v. *Farley*, 114 S. Ct. 2291 (1994). Opp. 25-26; see Pet. Supp. Mem. Auth. For the reasons set out below, these concessions strongly support this Court's review.

1. Respondent begins by conceding that "[t]here is no question that petitioner suffers from a head injury incurred years earlier in an accident, that the accident evidently has altered petitioner's emotions and judgment, and that he requires medication for seizures." Opp. 4; see Pet. 5. These are the very bases of petitioner's claim that he was incompetent to rescind the plea agreement. Respondent acknowledges that "[p]etitioner's condition deteriorated" during the pendency of his plea agreement with the state, and that this deterioration may have been the result of the "impair[ment]" of petitioner's competence caused by his failure to take medication. Opp. 4; see Pet. 6.[1] Respondent finds himself at a loss to explain

[1] Respondent's selective quotation from a statement made by one of petitioner's attorneys to the state court, Opp. 6 & n.9, must be understood in context. Respondent conspicuously omits the fact that immediately after Mr. Lyons' made the quoted statement, he

the purpose of petitioner's "foolish" behavior in declining to enter a formal plea, a decision that could have had no rational basis. Opp. 6 n.8; *cf.* Pet. 8.

Respondent, unlike the Ninth Circuit majority, concedes that under this Court's decisions competency is a mixed question of law and fact. Opp. 13 ("competency is solely a question of fact *if* the legal standard is not at issue") (emphasis in original); see also *Amici Curiae* Brief of the Ala. Disabilities Advocacy Program and the Southern Poverty Law Ctr. at 5-12 (noting the need for federal courts on habeas review "to preserve the threshold level of competency required to permit criminal prosecution of a defendant" in order to maintain the "moral dignity" of the criminal process and public confidence in convictions). Respondent also agrees that this Court's decision in *Townsend* v. *Sain*, 372 U.S. 293 (1963), would require the district court to hold an evidentiary hearing on petitioner's competency if that claim had been raised, Opp. 16-17, which—as shown below—it was. Respondent understandably offers no defense of the majority's holding below concerning the nature of the competency determination itself or the analysis that confused the burden of proof at a habeas hearing (which was never held) with the standards for holding an evidentiary hearing in the first place.

Because the legal issues presented by the majority's decision below are worthy of this Court's review, respondent blithely attempts to distract this Court with unfounded accusations and by claiming that petitioner did not raise the issue of his competency to withdraw from the plea agreement in the proceedings below. Opp. 9-10. This

---

warned the court that "I'm not qualified obviously to render psychiatric opinions." Exh. 119 at 483-F. The state in turn responded, quite appropriately, that it was "not satisfied with the state of the record" regarding petitioner's competency. *Id.* Accordingly, respondent's attempt to suggest that petitioner was somehow competent to proceed should be rejected.

simply is not the case and respondent's claims are belied by the record.[2] In his habeas petition, petitioner specifically pled, *inter alia,* that "[he] did not knowingly and voluntarily relinquish[] his rights under the Agreement." Opp. App. 5. In addition, petitioner devoted *an entire section* of his memorandum's plea agreement argument to his claim that "[p]etitioner may have been mentally ill at the time that decisions concerning the plea agreement were made." Memorandum of Law in Supp. of Answer to Resp'ts Mot. to Den. Habeas Corpus Relief at 30 ("Pet. Mem.") (section heading). Ironically, the state's own response to petitioner's memorandum had argued *in contra* that "petitioner was competent to rescind his plea agreement." Response to Pet'rs Answer to Mot. to Den. Habeas Corpus Relief at 6. Consequently, respondent is flatly wrong in claiming that petitioner abandoned "the only claim that contained any reference to his mental state," Opp. 10.

Respondent also claims that the federal magistrate below was unaware of and was not presented with any issue with respect to petitioner's competence, *id.*, that the district court in its decision had "fully considered the merits of petitioner's claims," *id.* at 15 n.19, and incredibly that *petitioner* has misled the Court, *id.* at 9. Once again, the record belies respondent's assertions. The magistrate's findings and recommendations adopted by the district court explicitly note that because petitioner's claims had been resolved on other grounds, it was not necessary to determine, *inter alia,* "whether Petitioner was mentally competent when he *first* indicated his desire to withdraw from the plea agreement." Pet. App. 39a n.4 (emphasis in original). In sum, petitioner's plea agreement claims were properly raised before the district court

[2] In the confines of this reply, petitioner can only address some of the many inaccuracies in respondent's brief in opposition. Therefore, petitioner at this time will address only those statements by respondent that relate to the issues presented to this court for review.

and were left unresolved only because the district court reached a wholly indefensible decision concerning its jurisdiction. See Pet. 10.

2. Respondent also contends that petitioner requested an evidentiary hearing "on one issue only," (Opp. 16): whether the state had suffered any prejudice by petitioner's equivocation about the formal entry of his guilty plea. However, petitioner's memorandum listed *several* grounds for an evidentiary hearing and claimed that "the *entire* proceeding [rescinding the plea bargain] denied petitioner due process of law." Pet. Mem. 35 (emphasis added). Only one of these grounds, (3), was based on "the so-called prejudice suffered by the state." *Id.* Petitioner specifically raised the issue that he was mentally ill at the time he was deemed to have rescinded the plea agreement, *id.* at 30, and placed *no* limitation on his request for a hearing: "Because petitioner has successfully rebutted the presumption of correctness of the state court's factual findings, an evidentiary hearing on petitioner's request for habeas corpus relief should be held." *Id.* at 36.

As noted in the petition, a district court on habeas review determines whether an evidentiary hearing is necessary only *after* it has decided whether or not to dismiss the habeas petition. See Rule 8(a) and accompanying Advisory Comm. Note of the Rules Governing Section 2254 Proceedings in the United States Dist. Courts; Pet. 18 n.7. The district court never addressed whether to hold an evidentiary hearing and all parties were informed of the limited scope of the court's decision on the state's motion to deny habeas relief. See United States Dist. Court for the Dist. of Or. Civil Docket for No. 90-CV-315, Entry of Nov. 27, 1991, Record of Phone Conf. ("The ct will consider petitioner's req for an evidentiary hrg, if necessary, after ruling on the pending mot to dsms"). By prematurely reaching the merits of the habeas petition before an evidentiary hearing ever occurred, the Ninth

Circuit majority deprived petitioner of the opportunity to present the claims he had raised before the district court.

3. Finally, respondent can provide no other cases to support the panel majority's view that it was permissible to allow a superseding indictment to extend the strict speedy trial time limits of the IAD. Respondent can only claim that hypertechnical "case-" and "fact-specific" differences between the conflicting cases suffice to distinguish them. "That is, in none of the cases cited by petitioner has a court held, in the circumstances of this case, that a continuance would not be for good cause," Opp. 23. Under respondent's strained interpretation, however, no conflict could ever exist unless the underlying facts were identical. Quite simply, the result reached by the majority below—that respondent was entitled to a "good faith" extension of time solely to secure a new indictment—is inconsistent with the text of the IAD itself and with the decisions of all courts construing that interstate compact. See Pet. 22-23; *Amici Curiae* Brief of the Nat'l Ass'n of Criminal Defense Lawyers, the Ala. Criminal Defense Lawyers Ass'n and the Or. Criminal Defense Lawyers Ass'n at 14-18 ("the Ninth Circuit decision simply cannot be squared with the principles and holdings of the [other] cases").

As before, respondent attempts to divert this Court's attention away from an issue worthy of this Court's review. Instead of focusing on the conflicting IAD decisions, respondent argues that the original indictment was not unconstitutional as held by the state trial court. Opp. 20-21. Respondent argues that petitioner's "allegations [of unconstitutional conduct] ring especially hollow in light of the Oregon Supreme Court's clear holding in *State* v. *Conger*, [319 Or. 484, 1994 WL 421381 (Or. 1994)]." Opp. 21 n.28. However, *Conger*, in which a split Oregon Supreme Court first interpreted the state constitution to permit grand jury deliberations with fewer

than seven members, was not even decided until August 11, 1994. Similarly, all of the cases respondent cites in order to attempt to justify its actions in 1983 were decisions reached long after the original indictment securing petitioner's presence in Oregon was quashed.

The case at issue in the 1983 hearing on petitioner's motion to quash was *State* v. *Gortmaker*, 655 P.2d 575 (Or. Ct. App. 1982) (in banc), later affirmed by the Oregon Supreme Court, 668 P.2d 354 (Or. 1983), *cert. denied*, 465 U.S. 1066 (1984). See, *e.g.*, Exh. 119 at 194. In *Gortmaker*, the Oregon court of appeals found that "[i]f the individual protection—or limitation on the state —provided by [the Oregon Constitution] is to have real meaning, *i.e.*, be enforceable, then an accused must be able to avoid trial on an indictment found by a grand jury selected in violation of the provision." 655 P.2d at 581. The court of appeals exhorted the lower courts to quash unconstitutional indictments before trial. "[W]e are confident that Oregon trial courts, correctly appraised of the law, will exercise diligently their responsibility to quash indictments issued in violation of [the Oregon Constitution]." 655 P.2d at 586. The state of the law in 1983, as specifically stated in the official commentary accompanying Oregon's grand jury statute, was that deliberations with less than seven grand jurors could proceed "only by order of the Court upon good cause shown." Exh. 119 at 197. Respondent, who had unilaterally dismissed a grand juror without good cause, was aware of the official commentary to this legislation, but explained to the court that he had chosen to ignore it. *Id.* at 234. Accordingly, respondent had no "good faith" basis for an extension of time to seek reindictment and this Court should resolve the conflict among the courts below with respect to the speedy trial requirement of the IAD.

* * * *

The issues presented by petitioner are supported by extensive *amicus* participation from a variety of organiza-

tions concerned with the proper functioning of the criminal justice and mental health systems. Respondent makes no effort to dispute the importance of the case as revealed by the petition and the *amicus* briefs. Instead, respondent consistently hides behind unsupported—and unsupportable—claims of waiver to avoid having the issues presented by petitioner reviewed by this Court. The Court need not take petitioner's word that the issues raised in his petition are fairly presented; petitioner, unlike respondent, urges the Court to call for the record below and to examine it for itself. The record demonstrates clearly that the issues presented here were raised below and that only the whipsaw effect of the district court and court of appeals' handling of petitioner's habeas petition prevented his claims from being fully resolved after some form of evidentiary hearing. Once the Court dismisses respondent's unsupported waiver arguments, then the justification for further review by this Court becomes plain.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. KING, SR.
KING, KING & KING
King Building
757 Chestnut Street
Gadsden, Alabama 35901
(205) 547-2431

REX E. LEE *
CARTER G. PHILLIPS
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Counsel for Petitioner

September 20, 1994

* Counsel of Record

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 93-1975

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONSE IN OPPOSITION

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
ROBERT M. ATKINSON
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the court of appeals was obligated independently to review the state court's determination of petitioner's competency to withdraw from the plea agreement when the issue of his competency was not raised at trial or on appeal as a basis for federal habeas relief.

2. Whether petitioner was entitled to an evidentiary hearing on his competency to withdraw from the plea agreement when he did not request an evidentiary hearing on that issue.

3. Whether the particular facts and circumstances surrounding the dismissal of the petitioner's original indictment and his subsequent reindictment provided "good cause" to toll the time limits established by the Interstate Agreement on Detainers.

TABLE OF CONTENTS

Page

Questions Presented i

Introduction 1

Supplemental Statement of Facts 2

Reasons to Deny the Writ

I. Petitioner's first question presented was not raised as a ground for federal habeas corpus relief. 9

II. Petitioner's claim of entitlement to an evidentiary hearing bears only on a legal issue that has dropped out of this case. 15

III. This case presents only a narrow question of "good cause" to toll the IAD time limit. 18

IV. *Reed v. Farley* does not supply an independent basis to grant certiorari. 25

Conclusion 26

Appendix A

Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody App-1

TABLE OF AUTHORITIES

Page

Cases Cited

Birdwell v. Skeen, 983 F.2d 1332 (5th Cir. 1993) . . . 24–25

Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) 13

Cody v. Morris, 623 F.2d 101 (9th Cir. 1980) 26

Davis v. Wyrick, 766 F.2d 1197 (8th Cir. 1985) 14

Demosthenes v. Baal, 495 U.S. 731 (1990) 12

Dusky v. United States, 362 U.S. 402 (1960) 14

Flugence v. Butler, 848 F.2d 77 (5th Cir. 1988) 13

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 15

Gilmore v. Taylor, 508 U.S. ___, 113 S.Ct. 2112 (1993) 18

Godinez v. Moran, 509 U.S. ___, 113 S.Ct. 2680 (1993) 14

Goodwin v. State of Oregon, 116 Or. App. 279, 840 P.2d 1372 (1992) 21

Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991) . . . 13–14

Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) 14

Maggio v. Fulford, 462 U.S. 111 (1983) 9,12,13

Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992), *rev'd on other grounds*, *Godinez v. Moran*, 509 U.S. ___, 113 S. Ct. 2680 (1993) 13

People v. Allen, 744 P.2d 73 (Colo. 1987) 24

People v. C'Allah, 100 A.D.2d 754, 474 N.Y.S.2d 305 (N.Y. App. 1984) 23

Reed v. Farley, No. 93-5418 (1994) 25,26

Spitzweiser-Wittgenstein v. Newton, 978 F.2d 1195 (10th Cir. 1992) 13

State ex rel. Schrunk v. Bonebrake, 318 Or. 312, 865 P.2d 1289 (1994) 22

State v. Conger, 319 Or. 484, ___ P.2d ___ (1994) . . 20-21

State v. King, 84 Or. App. 165, 733 P.2d 472 *rev. denied*, 303 Or. 455 (1987) 7,8,14 20-21

State v. Shaw, 98 N.M. 580, 651 P.2d 115 (N.M. App. 1982) 23

State v. Stout, 305 Or. 34, 749 P.2d 1174 (1988) 20

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979) 24

Teague v. Lane, 489 U.S. 288 (1989) 18

Townsend v. Sain, 372 U.S. 293 (1963) 17

United States v. Cephas, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992) 23

United States v. Dion, 476 U.S. 734 (1986) 15

United States v. Ford, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom United States v. Mauro*, 436 U.S. 340 (1978) 24,25

Constitutional Provisions

Or. Const. Article VII (Amended), section 5 19

Statutory Provisions

28 U.S.C. § 2254 26

28 U.S.C. § 2254(d)(3) and (8) 16

28 U.S.C. § 2254(d)(7) 16

Or. Rev. Stat. § 132.110 19,20

Or. Rev. Stat. § 132.360 19

Or. Rev. Stat. § 135.510 20

Or. Rev. Stat. § 135.520 22

No. 93-1975

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONSE IN OPPOSITION

INTRODUCTION

Respondent, State of Oregon, finds little in the petition for writ of certiorari with which it can agree. Even disregarding their gratuitous attacks on the quality of justice in Oregon[1] and the integrity of the officials who prosecuted this case,[2] petitioner and

---

[1]The petition's statement of the case, for example, opens with the hyperbolic declaration: "Something is rotten in Oregon." Pet. Cert. 2.

[2]Petitioner and his *amici* come perilously close to accusing the members of the Clackamas County District Attorney's Office of unethical conduct when they charge that the state secured petitioner's presence in Oregon pursuant to an indictment that "it" knew was "patently unconstitutional under Oregon law." Pet. Cert. 20. *See also* n. 28, *infra* (discussing similar

(continued...)

his *amici* largely lose sight of the factual and procedural posture of this case. As a result, they misidentify the issues that the case fairly presents. This response therefore begins by offering a more complete description of the facts surrounding petitioner's withdrawal of his guilty plea. It then responds to each of the questions the petition presents, clarifying the procedural context as necessary and demonstrating in what way the question either is not presented at all, or is not the same question that petitioner seeks to have the Court decide.

SUPPLEMENTAL STATEMENT OF FACTS

The petition paints a picture of a seriously mentally ill criminal defendant who struck a plea bargain with prosecutors that they later, wholly without justification, refused to permit him to perform. Petitioner's description suggests that the state gained the full benefit of the plea bargain (information about the crime and petitioner's testimony against his co-defendant) and then took advantage of the petitioner's failure "formally" to enter his guilty plea as a basis to abandon the agreement altogether. The light in which petitioner has cast this case is, however, neither accurate, complete nor fair. Petitioner was, instead, a criminal defendant who became dissatisfied with the terms of the plea bargain he struck, who then tried unsuccessfully to alter those terms, and who declined to follow through on the plea agreement and insisted on going to trial when he could not get it changed.

In August of 1983, petitioner agreed in writing to plead guilty in exchange for the state's agreement to reduce the charge from

---

[2](...continued)

statements by *amici*). As discussed later in this response, the original indictment met all constitutional requirements and there is no question that, under state law, it should not have been dismissed by the trial court in the first instance.

aggravated murder (potentially a capital offense) to murder. Petitioner further agreed to provide information relevant to the investigation of other participants in the murder, and to testify against those other participants, including James Salter. The state agreed to recommend a life sentence, with a 10-year minimum sentence before parole eligibility, to be served concurrently with any other sentence petitioner was then serving. In December of 1983, petitioner requested a continuance of the entry of his guilty plea. By January or February of 1984, however, petitioner no longer liked the terms of the plea agreement. Even though he already had performed many of his responsibilities under the plea bargain (*i.e.*, he had provided investigatory information and he had testified in some of the proceedings relating to James Salter), petitioner wanted to strike a new deal. Specifically, he wanted his custody transferred to another state. Petitioner emphasizes in the certiorari petition that he was fearful that his life was in danger because of his cooperation against his co-defendants, and that he wanted the transfer for protection. Pet. Cert. 4–5. But he neglects to explain that his demand was specifically limited to a transfer to the State of Alabama, where petitioner's father practices law.[3] Exh. 119, at 516-P and -Q.[4] He also neglects to explain that he did not merely seek "permission to serve his sentence in * * * Alabama" (Pet. Cert. 5); rather, he wanted the State of Oregon to give Alabama authorities complete control over his legal custody, and specifically over parole and pardon decisions. *Ibid.* That demand simply was unacceptable, and state prosecutors would not agree to it.

---

[3]Petitioner's father is now among the lawyers representing him.

[4]Exhibit 119 is the state court transcript, which was made a part of the record in the federal habeas proceedings.

There is no question that petitioner suffers from a head injury incurred years earlier in an accident, that the accident evidently has altered petitioner's emotions and judgment, and that he requires medication for seizures.[5] But until his dissatisfaction with the plea agreement, petitioner had been able to proceed without any question as to his competency. He had been arraigned, he had negotiated and signed the plea agreement, he had provided investigatory information to police, he had testified in a "most impressive and professional manner" at James Salter's grand jury hearing, and he been an effective witness at Salter's bail hearing. Exh. 119, at 516-L through 516-O. When the state did not agree to the new demand to give up control over his physical and legal custody to Alabama, however, petitioner warned prosecutors that he would stop taking his medications and become psychotic. *Ibid.* His threat was consistent with earlier statements to jail personnel that, because he had minored in psychology in college and had studied the symptoms of mental illness, he knew how to "fake" mental illness. Exh. 119, at 516-H and -I. Despite the threat, the state stood by its refusal to alter the plea agreement. Petitioner, true to his word, stopped taking his medication.

Petitioner's condition deteriorated after that, whether because he was feigning incompetency or because he successfully impaired his competency by not taking his medication. Jail personnel, for example, observed him deliberately make himself look unkempt at strategic times — *i.e.*, before he was to appear as a witness at James Salter's trial and before he was examined by a physician appointed by the court to determine his competen-

---

[5]*See, e.g.*, Pet. Cert. App. 55a–62a (physicians' reports).

cy to stand trial.[6] His mental state either was erratic and unstable, or contrived. When he attended Salter's trial, for example, his competency as a witness was determined in a hearing outside the jury's presence. In the course of that preliminary examination, he gave confused and incoherent answers. After the court found him to be a competent witness and he was required to testify before the jury in the Salter trial, he immediately became able to answer all of the state's questions without uncertainty or hesitation. Exh. 119, at 516-T through -AA.[7]

During this period, his competency to proceed in his own case became an issue for the first time. Petitioner appeared before the state court judge on February 24, 1984, to ask permission to proceed *pro se* and to withdraw from his plea agreement. The court cautioned him against withdrawing from the plea bargain, told him to consider his decision further, and

---

[6]Petitioner stopped shaving, brushed his hair in front of his face, pulled his shirt out of his trousers, went without shoes and wore sweatclothes in place of the three-piece suits he wore to prior court appearances. Exh. 119, at 516-D, -E, -F, and -T.

[7]A newspaper report that petitioner placed in the record of the federal habeas proceeding described petitioner's remarkable transformation:

> King's testimony before the jury came after a morning marked by a bizarre turn of events when a disheveled, incoherent sounding King claimed, with the jury out of the courtroom, that he didn't know where he was or why he was being held in the Clackamas County jail. * * * Clackamas County Circuit Judge Patrick Gilroy, after hearing testimony from several county sheriff's deputies, ruled King was faking symptoms of insanity, and therefore was competent to testify, which, he pointed out, is not the same thing as being fit to stand trial. * * * King spoke with a ponderous Southern Accent and often held his head in his hands during testimony. Still, that was a far cry from the unkempt, confused-sounding King who testified out of view of the jury Wednesday * * *.

Exh. 42, at 1.

scheduled a hearing for three days later.[8] At the hearing, petitioner's attorney questioned petitioner's competency to make the decision to represent himself. Exh. 117, at 34. The court ordered petitioner to be examined by Dr. Parvaresh, whose examination was inconclusive. Exh. 117, at 39; Exh. 111; Pet. Cert. App. 58a. Dr. Parvaresh believed, however, that if petitioner would resume his medication, he would be stable enough to be reexamined in seven to ten days. Exh. 111; Pet. Cert. 58a. By March 12, 1984, petitioner still was not taking his medication; the court therefore ordered that petitioner be committed to the state mental hospital for further examination. Exh. 119, at 478.

On May 31, 1984, petitioner appeared before the trial court with his attorney, Mr. Lyons, who advised the court that petitioner during the prior two weeks had been taking his medication and that, as suggested by the report of Dr. Parvaresh, he was again competent to proceed.[9] Despite the fact that neither

---

[8]The court informed petitioner that if he reneged on the agreement, "you're back in the very vulnerable position you were in before you made your agreement, plus they have two days of your testimony, it seems like a foolish move on your part." Exh. 117, at 25.

[9]Mr. Lyons' statement to the court was quoted at length by the Oregon Court of Appeals when it affirmed petitioner's conviction:

> Your Honor, over the past couple weeks it apparently has been — the situation appears to be Mr. King has reinstated the use of his medication. That appears to be the information from the jail staff. And Mr. King himself, in conversation that I had with him over the last couple days, including up to and last evening, it appears that the medications are at — Dr. Parvaresh indicates in his report as well as Dr. Larson having the effect on Mr. King which they intended that they would, which is that *he is presently able to understand the nature of the proceedings against him and that he is able to assist*. At this time, based on that and the conversations I have had with Mr. King in which it does appear to me that

(continued...)

petitioner nor his attorney seemed to be questioning petitioner's competency, the state, out of an abundance of caution, put on expert testimony demonstrating petitioner's competency.[10] The court ruled that petitioner was able to aid and assist in his defense, and thus was competent to proceed.[11] Defense counsel immediately asked the court to set a trial date. The prosecutor reminded the court that there was a plea agreement in the case and asked for a commitment as to whether petitioner intended to

---

[9](...continued)

> although these reports indicate he does, in fact, suffer from a mental illness, nonetheless on his medications, *he is able to understand the nature of the proceedings against him and to assist his counsel as to the proceedings against him.*

State v. King, 84 Or. App. 165, 174, 733 P.2d 472 *rev. denied*, 303 Or. 455 (1987) (emphasis added by the Oregon Court of Appeals) *quoting* Exh. 119, at 483-C and -D. *See also* Exh. 119, at 483-C, -E, -F (counsel acknowledges that petitioner is stable, understands the nature of the proceedings and his options, and is able to aid and assist in his defense).

[10]The state offered the testimony of a psychiatrist with 18 years experience on the maximum security wards at the state mental hospital. Exh. 119, at 485. The doctor stated that he observed no hallucinatory or psychotic behavior on petitioner's part during his stay in the hospital. The doctor's diagnosis was that petitioner suffered from brain damage which affected his emotions and judgment, but not his intellectual capacity or his memory. Exh. 119, at 490. He described petitioner's refusal to take his medication as self-serving maneuvering designed to make him appear psychotic. Exh. 119, at 492.

[11]The trial court stated:

> I think that even considering the report of the other doctors, and what his behavior has been subsequent to that time, there is no question in my mind that he now understands the nature of the proceedings and that he is able to assist and cooperate with counsel and is able to participate in his defense.
>
> So you can put those findings in, if you want, in preparing the order, that I do find that he has a mental defect. But the other findings support, I think, the conclusion that he is able to proceed in his own defense.

Exh. 119, at 518-19.

enter a guilty plea. The defense was noncommittal,[12] and the court instructed the state to file a formal motion to set aside the plea agreement so that the matter could be resolved. Exh. 119, at 520–21.

The motion was heard on July 9, 1984, at which time one of petitioner's attorneys made it clear that the defense wanted more time to continue to try to work out an agreement to transfer petitioner's legal custody to Alabama. Exh. 119, at 524–25 (co-counsel Mr. Clancy). The state pointed out that most of its witnesses were out of state and that it did not want to embark on expensive trial preparations if petitioner intended to plead guilty. Exh. 119, at 525–26. The deputy district attorney stated that, based on petitioner's request for a trial date, he believed petitioner was withdrawing from the agreement. Exh. 119, at 526. The court asked defense counsel, Mr. Lyons, if he wanted to add anything. Mr. Lyons said that he had nothing to add. *Id.* The court found that defendant had rescinded the plea agreement and nullified it.[13]

REASONS TO DENY THE WRIT

I. Petitioner's first question presented was not raised as a ground for federal habeas corpus relief.

As a first basis for certiorari, petitioner asserts that this case presents the Court with "a perfect opportunity to clarify the

---

[12]Neither petitioner nor defense counsel disputed the deputy district attorney's assertion that petitioner was seeking to withdraw from the plea agreement by asking for a trial date. Nor did either suggest to the trial court that petitioner intended to comply with the agreement, that he objected to setting the agreement aside or that he objected to the entry of a not guilty plea. Exh. 119, at 510–11.

[13]That order was not made a part of this record. The Oregon Court of Appeals quoted it in its opinion affirming petitioner's conviction. *State v. King, supra*, 84 Or. App. at 175.

Court's decisions that underlie the circuit split of authority as to the factual and legal nature of the competency determination." Pet. Cert. 11. There are two problems with petitioner's presentation of this issue. The first is that the issue of petitioner's competency was not raised as a ground for federal habeas relief. The second problem is related: Because petitioner did not seek habeas relief on the basis that the state court erroneously determined that he was competent to rescind the plea agreement, petitioner has never before (until this petition for certiorari) questioned the legal standard applied by the state court. If the state court's resolution of petitioner's competency is properly an issue in this case at all, it is squarely controlled by this Court's decision in *Maggio v. Fulford*, 462 U.S. 111 (1983).

1. *Lack of preservation.*

Most of the procedural and factual misimpressions created by the petition are a result of omission. There is, however, one explicitly incorrect assertion in the petition's statement of the case, and it is critical to the first question presented. Petitioner states that he specifically asked the district court to decide, among other issues, whether "he was competent to withdraw from the plea agreement." Pet. Cert. 9. That statement is simply wrong.[14]

The petition for writ of habeas corpus asserted only three grounds for relief: (1) that petitioner's due process and self-incrimination rights were violated because the trial court would not specifically enforce the plea agreement; (2) that petitioner's

---

[14]On appeal to the Ninth Circuit, petitioner made the same wrong assertion. App. Br. 12. The state, in response, did not take petitioner to task on the point because petitioner was not, in any event, raising or arguing the issue on appeal. The dissenting opinion uncritically accepted petitioner's erroneous characterization of the issues before the district court. Pet. Cert. App. 22a.

prosecution was barred under the Interstate Agreement on Detainers (IAD) because petitioner is "mentally ill"; and (3) that the prosecution was barred under the speedy trial provisions of the IAD. App. 4–6 (Pet. for Writ of Habeas Corpus). There was no claim that petitioner was not competent to withdraw from the plea bargain, or that the state court either legally or factually erred in making the competency determination.

Petitioner later filed a memorandum in response to the state's motion to deny habeas corpus relief. In it, petitioner expressly abandoned the only claim that contained any reference to his mental state — *i.e.*, whether the IAD barred his prosecution on the basis that he was mentally ill. Pet. Memo. 2. Nothing in the memorandum challenged the state trial court's finding that petitioner was competent at the time he withdrew from the plea agreement. That is, petitioner did not ask the federal district court to revisit the issue of his competency; he did not claim that the state court had applied an incorrect legal standard in making that determination; he did not request an evidentiary hearing on the subject of his competency to withdraw from the agreement. *See generally* Pet. Memo. The Findings and Recommendation issued by the magistrate, and adopted by the district judge, confirmed that the only issues to be resolved by the court were whether petitioner was entitled to insist on specific enforcement of the plea agreement and whether the prosecution was barred by the IAD's speedy trial provisions. Findings and Recommendation, at 2; Order, April 21, 1992.

Nor did petitioner raise the question of his competency in his appeal to the Ninth Circuit. The only question he presented to the court below that had any bearing on the plea agreement was whether the state violated petitioner's due process rights when it failed to honor the plea bargain after petitioner had fully per-

formed his obligations under it. *See* App. Br. i. Again, petitioner did not argue that he was not competent to withdraw from the plea agreement; he did not claim that the state court had applied an incorrect legal standard to judge competency, or that its factual findings were unsupported or made without a full and fair evidentiary hearing; he did not ask the appeals court to order the district court to consider his competency to withdraw from the agreement or to hold an evidentiary hearing on his competency. Nor did he ask the appeals court to apply a different legal standard to the facts of competency found by the state court. *See generally* App. Br. Indeed, the majority expressly recognized that petitioner did not challenge *any* aspect of the state court's ruling that he was competent to stand trial: "The [state] court ruled that King was competent to stand trial, and that ruling is not challenged in this appeal." Pet. Cert. App. 6a.

Petitioner nevertheless reads the decision below to hold that the question of his competency to withdraw the plea agreement was purely one of fact, rather than a question of fact to be resolved pursuant to a correct legal standard for competency. To infer that holding would be unfair to the lower court, however, because whether competency is a question of fact or a mixed question of law and fact, and whether the state court below applied the correct legal standard, were never remotely at issue in this case. Petitioner's failure to raise any claim about his competency is probably explained by the fact that he and his attorney conceded rather than contested his competency when petitioner refused to enter a guilty plea and insisted instead on a trial date. The majority opinion discussed petitioner's competency only in response to the dissenting opinion's passing reference to

doubts about petitioner's mental state[15] and as a foreword to the majority's agreement with the state court's determination that it was petitioner, not the state, who chose to abrogate the plea agreement. Pet. Cert. App. 12a.

In short, contrary to petitioner's argument, the Ninth Circuit did not hold that the legal standard for competency applied by the state courts is insulated from habeas review; the issue was not before the appellate court below. The question petitioner seeks to have the Court decide simply is not presented in this case.

2. *There is no significant question for this Court to settle.*

Even if the Ninth Circuit's decision, by *dictum* or otherwise, suggests that it deferred to the state court competency determination, that deference was proper under *Maggio v. Fulford*, *supra*. In *Maggio*, this Court held that competency is a factual question in which the state court's determination is subject to the presumption of correctness when there is "no dispute as to the proper legal standard to be applied for determining the correctness of the trial court's actions." 462 U.S. at 116. The same was true in *Demosthenes v. Baal*, 495 U.S. 731 (1990). Petitioner relegates those cases to a footnote and tries to distinguish them on the basis that "[n]o legal issues surrounding the competency determination were involved." Pet. Cert. 13 n. 3. But the posture here is identical. As in *Maggio* and *Demosthenes*, petitioner never disputed the legal standard that the

---

[15]Pet. Cert. App. 25a–26a. The dissenting judge did not conclude that petitioner was not competent to withdraw his plea. Rather, the dissent was unwilling to construe petitioner's refusal to plead guilty as a rescission of the plea agreement due to several considerations, including concerns that petitioner was not competent on February 24, 1984, when he first attempted to represent himself and withdraw from the plea. Even the dissent did not appear to doubt petitioner's competency on May 31, 1984, at which point he had resumed his medication and was again cooperating with his attorney.

state court applied to the competency determination. To whatever extent the Ninth Circuit's decision can be read to review the state court's competency determination, that determination appropriately was reviewed by applying a presumption of correctness to the factual findings made by the state court because of the absence of a challenge to that legal standard.[16]

Petitioner's effort to manufacture a conflict among the circuits fails for the same reason. Each of the cases petitioner cites as holding that the legal standard for competency is beyond the scope of federal habeas review merely recognized, consistent with *Maggio*, that competency is solely a question of fact *if* the legal standard is not at issue.[17]

---

[16]The Ninth Circuit's decision in *Moran v. Godinez*, 972 F.2d 263 (9th Cir. 1992), *rev'd on other grounds*, *Godinez v. Moran*, 509 U.S. ___, 113 S. Ct. 2680 (1993), demonstrates that the court understands the correct approach when the legal standard is at issue:

> Even if the presumption of correctness could apply to a state court's finding that defendant was competent to waive constitutional rights, it cannot apply in Moran's case. This is so because, as the following discussion demonstrates, the state court applied the wrong legal standard to evaluate Moran's competency to waive constitutional rights.

972 F.2d at 266. Although this Court reversed the Ninth Circuit because the legal competency standard the court applied was incorrect, this Court expressed no reservation about the Ninth Circuit's understanding of the interaction of law and fact in resolving these questions.

[17]Petitioner cites *Spitzweiser-Wittgenstein v. Newton*, 978 F.2d 1195 (10th Cir. 1992); *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991); and *Flugence v. Butler*, 848 F.2d 77 (5th Cir. 1988), as holding that the federal courts may not review the state court's determination of competency if it is fairly supported by the record. Each case, however, like *Maggio* and this one, raised no question about the correctness of the legal standard applied by the state court. Moreover, two of those circuits unequivocally have demonstrated their recognition that the federal courts must review the legal standard applied by the state court if it is challenged. *See Bouchillon v. Collins*, 907 F.2d 589, 593 n. 11 (5th Cir. 1990) (acknowledging that the

(continued...)

Moreover, it is difficult to understand why petitioner thinks the question of the "factual and legal nature of the competency determination" (Pet. Cert. 11) warrants the Court's attention so soon after its decision in *Godinez v. Moran*, 509 U.S. ___, 113 S.Ct. 2680 (1993). There, the Court addressed the legal standard to be applied on habeas review of state court determinations of competency to waive constitutional rights. In light of that case, it is unlikely that the circuits would not be aware that some legal standard must be applied to a state courts' factual findings on competency when a petitioner's claim properly raises the issue.

Finally, petitioner's effort to suggest, for the first time in the petition for certiorari, that the state court applied an incorrect legal standard founders on his trial counsel's acknowledgment that petitioner was fit to aid and assist in his defense. *Godinez* holds that the standards for competency are "modest." An accused who wishes to waive rights must "ha[ve] the capacity to understand the proceedings and to assist counsel." 113 S.Ct. at 2688. Petitioner's counsel conceded that petitioner was "able to understand the nature of the proceedings against him and to assist his counsel as to the proceedings against him." *State v. King*, *supra*, 84 Or. App. at 174 (quoting counsel's representations). The state court announced its decision in the same terms. *See* discussion *supra* at p.7 n.11. Thus, petitioner conceded and the

---

[17](...continued)

state court must apply the correct legal standard to the facts of competency it finds); *Lafferty v. Cook*, 949 F.2d 1546, 1549-50 (10th Cir. 1991) (holding that the federal court reviews the legal standard applied by the state court *de novo*). That recognition is implicit in the Eighth Circuit's decision in *Griffin*, which began its analysis by discussing the legal standard for competency set out in this Court's opinion in *Dusky v. United States*, 362 U.S. 402 (1960), an acknowledgment that would have been superfluous if the court had viewed competency as solely a factual question. 935 F.2d at 929 n. 1. *Accord Davis v. Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985).

state court found that petitioner met the standard this court recently announced.

II. Petitioner's claim of entitlement to an evidentiary hearing bears only on a legal issue that has dropped out of this case.

Petitioner argues that the Ninth Circuit, in applying the presumption of correctness to the state court's findings, denied him the opportunity to present evidence that would, he asserts, have demonstrated that those findings were wrong.[18] Petitioner is careful, however, never specifically to identify those issues on which he sought an evidentiary hearing. Nor does he offer any basis on which the Court could conclude that the sole issue on which he asked for an evidentiary hearing could have affected the outcome of the case.[19]

---

[18]However one might characterize the claims presented by petitioner in this argument, they undeniably attack the *procedure* followed by the Ninth Circuit. *See* Pet. Cert. 18-19. Amicus GCDLA, by contrast, argues that the Ninth Circuit was substantively wrong in its application of due process principles to petitioner's efforts to reinstate the plea agreement. Indeed, the questions presented by GCDLA are neither those presented by petitioner nor fairly included therein as required by this Court's Rule 14.1(a). *Compare* Questions Presented, Pet. Cert. i, *with* Questions Presented, GCDLA Brief i. *Amici* may not expand the issues beyond those presented by the petitioner. *United States v. Dion*, 476 U.S. 734, 736 n. 3 and 746 (1986). Nor is the question that GCDLA seeks to present logically or legally antecedent to those presented by petitioner. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-38 (1991) (Stevens, J., dissenting) (listing cases in which the Court has resolved questions that are antecedent to those raised by the parties). To the contrary, the procedural question raised by petitioner necessarily is antecedent to the substantive issue GCDLA seeks to inject.

[19]One other aspect of petitioner's second argument deserves comment. Petitioner sets up his argument by asserting that the district court concluded that it did not have jurisdiction to resolve petitioner's claims and that, on appeal, the Ninth Circuit inappropriately resolved the merits without returning the case to the district court for an evidentiary hearing. The district court, however, fully considered the merits of petitioner's claims. It concluded that petitioner failed to state a claim of constitutional dimension

(continued...)

Petitioner requested an evidentiary hearing in the district court on one issue only: whether the state court correctly found that the state was prejudiced by petitioner's withdrawal from the plea agreement. Pet. Memo. 34–36.[20] Petitioner relied on 28 U.S.C. § 2254(d)(3) and (8), asserting that the record did not contain any factual support for the claim of prejudice, and on § 2254(d)(7), claiming that fundamental fairness required the state to specifically perform the plea agreement where, *inter alia*, the only prejudice it claimed involved the undocumented costs of trial preparation. Pet. Mem. 34–36. Petitioner did not ask for an evidentiary hearing on any other basis or on any other issue. In particular, petitioner did not ask for or otherwise suggest that he should receive an evidentiary hearing on the question of his competency to withdraw from the plea agreement.

In his petition to this Court, however, the only issue on which petitioner claims a right to an evidentiary hearing is his competency to withdraw from the plea agreement. Pet. Cert. 17 n. 6, and 18.[21] Because petitioner did not suggest to the lower

---

[19](...continued)

that would invoke the habeas power, and it was only in that sense that the district court found that it did not have "jurisdiction" to grant petitioner habeas relief. *See* Pet. Cert. App. 37a.

[20]In addition to not seeking a hearing on his competency, petitioner did not ask the district court to hold an evidentiary hearing on the state court's finding that it was petitioner, not the state, who reneged on the agreement.

[21]Petitioner at times frames his second argument in vague terms, referring to his "inchoate claims" and his "plea agreement claims." Pet. Cert. 16, 17 n. 6, and 18. The only specific claim he mentions, however, is the competency issue. *Ibid.* For example, petitioner accuses the court of appeals of "jump[ing] to the conclusion that petitioner 'ha[d] not presented evidence *that he was incompetent* at the time of the court's ruling sufficient to establish by convincing evidence that the state court's determination was

(continued...)

courts that he was entitled to a hearing on his competency, he cannot fault either the district court or the Ninth Circuit for not addressing that unasserted claim. Thus, although petitioner correctly observes that *Townsend v. Sain*, 372 U.S. 293 (1963), requires district courts to hold evidentiary hearings under six specified circumstances, that assertion is irrelevant to the claims he presses in this Court. He never attempted to demonstrate that any of those circumstances applied to his competency claim.

If petitioner means to suggest that the district court erred by not holding an evidentiary hearing on the question of prejudice to the state — the only issue on which a hearing was requested — that claim no longer matters. Petitioner does not resurrect his original argument that due process requires the government to specifically perform a plea agreement in the absence of prejudice to the government's interests. That substantive issue is not advanced as an independent basis for certiorari, nor is it fairly subsumed within the questions petitioner presents. Unless petitioner plausibly can and actually does argue that due process *mandates* reinstatement of a previously rescinded plea agreement absent proof that the state was prejudiced by the rescission, an evidentiary hearing on prejudice can have no bearing on the case at this point.[22]

---

[21](...continued)

erroneous.'" Pet. Cert. 18 (emphasis added). If petitioner intended to suggest that he was entitled to an evidentiary hearing on some other factual claim, he has neither identified that claim nor suggested how he demonstrated that entitlement within the terms of *Townsend v. Sain*, 372 U.S. 293 (1963).

[22]GCDLA does advance the substantive argument, or one related to it, by asserting that petitioner was entitled under the Due Process Clause to specific performance of the plea agreement. *See* n. 18, *supra*. GCDLA does not, however, attempt to suggest that the principle on which it relies is

(continued...)

In short, the broad question relating to the availability of federal evidentiary hearings that petitioner seeks to have this Court decide is not fairly presented by this case. Petitioner did not seek an evidentiary hearing on the competency question. Yet, he no longer seeks to enforce the plea agreement on any theory other than the theory that he was not competent to withdraw from it. Thus, any claim that he should have been entitled to an evidentiary hearing to examine whether the state was prejudiced by his refusal to enter his guilty plea is either academic or moot.

III. This case presents only a narrow question of "good cause" to toll the IAD time limit.

Article IV(c) of the IAD provides, in part, that "for good cause shown in open court," the court "may grant any necessary or reasonable continuance" beyond the 120-day period in which a transferred prisoner must be tried. Petitioner tries to present, as a third issue in the petition, a broad question of the ability of a superseding indictment to extend the 120-day period for trial under the IAD. Specifically, petitioner makes the expansive claim that the Ninth Circuit "interpreted the IAD in a way that is inconsistent with the interpretations of all other courts to address

---

[22](...continued)

established. To the contrary, it presents this case as an "opportunity" to address rules of construction for plea agreements. GCDLA Brief 11. In other words, GCDLA asks the Court to announce a new rule in this case on habeas review — *viz.*, that due process entitles a criminal defendant who has partially performed the terms of a plea agreement and who then withdraws from the agreement before pleading guilty, to reinstate the agreement at will unless the state is prejudiced by the withdrawal. GCDLA does not urge that this rule is dictated by any prior decisions of this Court. Thus, it inevitably must be asking the Court to announce a new rule on collateral review, which the Court repeatedly has declined to do. *Gilmore v. Taylor*, 508 U.S. ___, 113 S.Ct. 2112 (1993); *Teague v. Lane*, 489 U.S. 288 (1989). GCDLA makes no claim that this case would fall within either of the two narrow exceptions to the *Teague* rule.

the issue by holding that the filing of a superseding indictment extends the time period specified by the IAD within which a state may try a prisoner held in custody pursuant to that Agreement." Pet. Cert. 19. In fact, the issue is narrow and distinctly fact-bound: May a state court find "good cause" for a continuance to allow the state to cure an arguably defective indictment, thereby tolling the 120-day period of the IAD, when the defendant's motion to dismiss the indictment is made on the eve of trial?[23] Before addressing that question, it is necessary to describe the true nature of the first indictment and its dismissal.

1. *The dismissal of the first indictment.*

Article VII (Amended), section 5, of the Oregon Constitution provides, in part: "A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment."[24] Or. Rev. Stat. § 132.110 allows the discharge of a grand juror who is unable to continue in the performance of duties. That statute provides that the court may "[a]llow at least five grand jurors to proceed upon good cause shown."

---

[23]As the district court pointed out in this case, its conclusion that the continuance was for good cause

> does not require a finding that reindictment *automatically* recommences the time limitations of the IAD. Rather, the only issue is whether a trial court has the discretion to grant a continuance, upon a timely motion by the State, to permit the State to resubmit the case to the grand jury *under the circumstances presented here.*

Pet. Cert. App. 33a (emphasis added; citation omitted).

[24]Echoing the constitutional provision, Or. Rev. Stat. § 132.360 provides:

> A grand jury may indict or present to the court for instruction as provided in ORS 132.370, with the concurrence of five of its members, if at least five jurors voting for the indictment or presentment heard all the testimony relating to the person indicted or facts presented.

Petitioner's first indictment was returned by a grand jury that initially consisted of seven grand jurors. Exh. 119, at 209. Later, one of the grand jurors was excused for business reasons. Exh. 119, at 212. Trial was set for April 18, 1983.[25] On April 11, 1983, on petitioner's motion, the trial court dismissed the first indictment, ruling that the grand juror's release had not been for "good cause" under Or. Rev. Stat. § 132.110. Exh. 119, at 241. In doing so, the trial court gave the state leave to resubmit the case to the grand jury and ordered a 30-day continuance (until May 15, 1983) for that purpose. Exh. 119, at 294–95.[26] The trial court found good cause for the continuance. Exh. 119, at 295–96.[27] On April 19, 1993, petitioner moved under the IAD to dismiss the indictment with prejudice for failure to try him within the 120-day period. Exh. 105. The trial court denied petitioner's motion, stating that "good cause has been shown [for the continuance] by the resubmission of the case to the Grand Jury . . . ." Exh. 119, at 320–21.

Or. Rev. Stat. § 135.510 provides the exclusive statutory grounds for dismissing an indictment, *State v. Stout*, 305 Or. 34, 41, 749 P.2d 1174 (1988), none of which includes that one grand juror improperly was dismissed. *State v. Conger*, 319 Or. 484,

---

[25]Petitioner arrived in Oregon on November 20, 1982. Ex. 106; *State v. King, supra*, 84 Or. App. at 169. Due to continuances to which petitioner agreed, trial was set for April 18, 1983. Exh. 106.

[26]Petitioner was not tried until August, 1984, due to continuances he requested.

[27]The trial court's order stated:

> THE COURT FINDS that the original indictment herein, having been quashed/set aside, and the Court having given leave to the State to resubmit the case to the Grand Jury, there exists good cause shown that this case be continued for thirty days * * *.

State v. King, supra, 84 Or. App. at 169 (quoting trial court order).

489, ___ P.2d ___ (1994). Further, under the Oregon Constitution, "a grand jury in which five or six members are participating may find an indictment, so long as five grand jurors concur in doing so." *State v. Conger, supra*, 319 Or. at 502. In short, although the issue was not settled at the time, the Oregon trial court that dismissed petitioner's first indictment did so incorrectly.[28]

2. *Because the continuance was for good cause, the 120-day time limitation was tolled; no conflict exists among the circuits.*

In light of the accurate description of the first indictment and its dismissal set out above, the question presented regarding the

---

[28]Petitioner states that "it is undisputed that petitioner was not even properly *indicted* within the time period specified in Article IV(c)." Pet. Cert. 20 (emphasis in original). He asserts that the state "knew" the first indictment "was patently unconstitutional under Oregon law." Pet. Cert. 20. *Amici* NACDL, ACDLA, and OCDLA repeat this misstatement: "[T]he very need for a superseding indictment was generated by the patently unreasonable action of the state in obtaining the original indictment in a knowingly illegal manner." Brief of *Amici* 17. *See* Brief of *Amici* 16 (the detainer was based on an indictment that was "knowingly and fraudulently obtained in violation of the Oregon Constitution.") Petitioner represents that the state had "full knowledge, *ab initio*, that the original indictment [was] entirely deficient." Pet. Cert. 21. Finally, petitioner states that the need to obtain the superseding indictment in this case was "occasioned by the bad faith of the prosecutor in securing the original indictment." Pet. Cert. 23.

Petitioner's and *amici*'s allegations ring especially hollow in light of the Oregon Supreme Court's clear holding in *State v. Conger, supra*, that an indictment returned by a grand jury of fewer than seven is constitutionally adequate, and is not subject to dismissal for failure to comply with statutory criteria for discharging grand jurors. At the time in question, it was settled practice in Oregon to discharge one and sometimes two grand jurors pursuant to the statute authorizing that procedure. The constitutionality of the statutory procedures was called into question only after the Oregon Court of Appeals' decision in *Goodwin v. State of Oregon*, 116 Or. App. 279, 840 P.2d 1372 (1992). The state of the law at the time petitioner was indicted — especially in light of the issue's ultimate resolution — does not even arguably justify the strident charges that state officials acted in "bad faith," "fraudulently," or "illegally" in securing the indictment against petitioner.

IAD is: When a criminal defendant moves one week before trial to dismiss an indictment, and the trial court incorrectly grants that motion, does the court's grant of a continuance to allow the prosecution to reindict constitute "good cause" for purposes tolling the 120-day period of the IAD?[29] The Ninth Circuit, agreeing with the Oregon Court of Appeals and the district court, concluded:

> The unanimous indictment was technically defective, but King did not move to dismiss it until the end of the time period, so the state had good cause for a thirty day continuance to take the case to a grand jury for another indictment.

Pet. Cert. App. 16a. The trial court had good cause to grant a continuance for the state to seek reindictment when petitioner moved to dismiss the first indictment nearly six months after he was arraigned in Oregon and only one week before his trial was to begin. *See* Or. Rev. Stat. § 135.520 (motion to dismiss must be filed within 10 days after arraignment); *State ex rel. Schrunk v. Bonebrake*, 318 Or. 312, 865 P.2d 1289 (1994) (motion to dismiss on grounds that grand jury was not composed of correct number must be filed timely under the statute). The Ninth Circuit's holding is correct.

Petitioner contends that the existence of a conflict among the circuits and various state courts requires review by this Court. Pet. Cert. 19. Petitioner, however, severely overstates the

---

[29]This question also replaces that posed by *amici* NACDL, ACDLA, and OCDLA:

> May the strict time limits of the Interstate Agreement on Detainers be extended by the state's need to obtain a superseding indictment following the dismissal of an indictment which was *unconstitutionally* obtained?

Brief of *Amici* i (emphasis added).

breadth of the Ninth Circuit's holding; as a result, he overstates the existence of a conflict. Whether a continuance in any given case is supported by "good cause" inherently is a fact-intensive question. The Ninth Circuit's pronouncement was limited: When a criminal defendant moves to dismiss an arguably defective indictment on the eve of trial and at the end of the IAD time period, the state has good cause for a 30-day continuance to seek an almost certain reindictment. Once the narrow, case-specific nature of the Ninth Circuit's holding is recognized, petitioner's perceived conflict evaporates. That is, in none of the cases cited by petitioner has a court held, in the circumstances of this case, that a continuance would not be for good cause, thus tolling the 120-day IAD time limitation.[30]

---

[30]In *United States v. Cephas*, 937 F.2d 816, 821 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992), for example, the Second Circuit addressed the government's argument "that because the charges against [the defendant], which had been the basis for the original detainer in issue, were dismissed, the detainer clock *automatically* stopped ticking and the 180-day period under article III disappeared." 937 F.2d at 821 (emphasis added). The Second Circuit's holding, which has nothing to do with the existence of "good cause," was that "[t]he government cannot lodge a detainer against the defendant and then throw out the clock every time it dismisses charges, only to start the clock anew by bringing a new set of charges." *See also People v. C'Allah*, 100 A.D.2d 754, 474 N.Y.S.2d 305 (N.Y. App. 1984) (rejecting state's argument that a new indictment erased the first indictment, thereby making the 180-day Article III time limit inapplicable). The state has no quarrel with those general statements. More importantly, they are not inconsistent with the Ninth Circuit's holding in this case.

Nor does *State v. Shaw*, 98 N.M. 580, 651 P.2d 115 (N.M. App. 1982) support the existence of a conflict. Like *Cephas* and *C'Allah*, *Shaw* rejected the state's argument that a second indictment started anew the running of the 180-day period under Article III. 651 P.2d at 118–19. The *Shaw* court noted that the state never had argued that the need to obtain a second indictment tolled the initial 180-day period, and it suggested that the prosecution should have sought a continuance for good cause — which was done here. 651 P.2d at 119-120.

(continued...)

Unlike the cases cited by petitioner, the state never argued in this case — and the Ninth Circuit did not hold — that the dismissal of the first indictment made the 120-day time limitation "disappear." The Ninth Circuit did not hold that the second indictment started a new 120-day time limitation. Nor did the appeals court hold that any continuance for reindictment "automatically" is a continuance for good cause, tolling the IAD time limitation.

Petitioner also asserts that the Ninth Circuit's decision in this case conflicts with decisions in the Second and Fifth Circuits addressing "administrative snafus." Pet. Cert. 23. In support of that proposition, he cites *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom United States v. Mauro*, 436 U.S. 340 (1978), and *People v. Allen*, 744 P.2d 73 (Colo. 1987). Yet, none of those cases addressed a situation where, because of a defendant's successful eleventh-hour motion to dismiss an indictment — one that is, at most, technically defective — the state needs time to secure a second indictment. This case does not involve an "administrative snafu," but rather a reasonable need to react to a defendant's late motion.[31] No conflict exists.

---

[30](...continued)

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979), cited by *amici* NACDL, ACDLA, and OCDLA is inapposite. In that case, the court never addressed whether a requested continuance was supported by "good cause." Rather, the court's only remotely relevant statements addressed the "shown in open court" requirement of Article IV. 587 F.2d at 839.

[31]In *Birdwell*, the issue was under what circumstances a continuance would toll the time limitation. The *Birdwell* court held:

> A continuance which is granted to allow a party to ascertain whether testimony is necessary for a dismissal hearing is not

(continued...)

By refusing to recognize the limited nature of the Ninth Circuit's holding, by ignoring the case-specific character of the "good cause" determination, and by quoting opinions from other courts out of context, petitioner has attempted to create a conflict out of thin air.

IV. *Reed v. Farley* does not supply an independent basis to grant certiorari.

In his supplemental memorandum of authority, petitioner suggests that "this case provides the Court with an opportunity to address the precise question it left open in *Reed* [*v. Farley*, No. 93-5418] — whether a prisoner who objects to delay can state a claim cognizable under Section 2254." Memo. 2-3; *see also* Brief of *Amici* 5-6 (same). To the contrary, this case is not one in which the Court should grant certiorari to address whether a trial court's failure to observe the 120-day rule of Article IV(c) is cognizable in federal habeas.

---

[31](...continued)

> upon good cause when the party requesting the continuance could have made the determination prior to the hearing by using reasonable diligence. Good cause did not exist in this case[.]

983 F.2d at 1340. That case-specific statement is not inconsistent with the Ninth Circuit's decision in this case.

Nor is the holding in *Ford* inconsistent with the Ninth Circuit's decision in this case. In *Ford*, the court found that the delays that occurred before defendant was tried were not for "good cause" when they were the result of the defendant's case being shuffled among different courts and being delayed due to a congested docket. 550 F.2d at 743. That fact-specific conclusion is not inconsistent with the Ninth Circuit's decision in this case.

Finally, in *Allen*, the issue was whether the defendant had waived the 120-day period by acquiescing in the setting of two trial dates outside of the 120-day period. Due to "an unfortunate combination of circumstances," 744 P.2d at 77, not all parties were aware of existence of the 120-day period. *Allen* stands only for the rule that the burden is on the prosecution to ensure that the trial is set within the period required by the IAD. Again, that has nothing to do with the issue decided by the Ninth Circuit in this case, *viz.*, whether the particular facts of this case constitute "good cause."

Whether a violation of Article IV's 120-day period is cognizable under 28 U.S.C. § 2254 never has been contested by the state; under controlling Ninth Circuit precedent, *see, e.g., Cody v. Morris*, 623 F.2d 101, 103 (9th Cir. 1980), the state was bound to accept that the district court had jurisdiction to consider the IAD claim. Accordingly, the issue was not considered in the first instance by the district court or the court of appeals; the issue would be better addressed by this Court in a case where it was raised below. Moreover, this Court necessarily will address the issue left open in *Reed* in any case that presents a valid issue regarding the IAD. It would make little sense for the Court to grant certiorari to address the *Reed* issue in this case, where the substantive IAD issue is meritless.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
ROBERT M. ATKINSON
ROBERT B. ROCKLIN
Assistant Attorneys General
Counsel for Respondent

September 15, 1994

APPENDIX A

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO241 (Rev. 5/85)

United States District Court	District: Oregon	
Name: ROBERT HADEN KING, JR.	Prisoner No.: 284587	Case No.: CV90-315DA
Place of Confinement: Clallam Bay Corrections Center, Clallam Bay, WA		
Name of Petitioner (include name under which convicted): Robert Haden King, Jr. V.	Name of Respondent (authorized person having custody of petitioner): Neil Brown Superintendent Clallam Bay Corrections Center	
The Attorney General of the State of: Oregon		

PETITION

1. Name and location of court which entered the judgment of conviction under attack Circuit Court of State of Oregon for Clackamas County, 807 Main Street, Oregon City, OR 97045
2. Date of judgment of conviction Nov. 13, 1984
3. Length of sentence Life with 30 year mandatory minimum consecutive to sentence defendant serving in Washington state.
4. Nature of offense involved (all counts) Aggravated Murder

AO241 (Rev. 5/85)

5. What was your plea: (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another county or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:
   (a) Name of court Oregon Court of Appeals
   (b) Result Conviction Affirmed
   (c) Date of result and citation, if known March 4, 1987
   State v. King, 84 Or.App. 167 (1987)
   (d) Grounds raised (1) Violations of Interstate Agreement on Detainers; (2) failure to specifically enforce plea bargain; (3) improperly obtained indictment; (4) transactional immunity and double jeopardy; (5) tainted identification testimony; (6) hypnotically enhanced testimony; (7) prosecutorial misconduct; (8) insufficient evidence.
   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
      (1) Name of Court Oregon Supreme Court
      (2) Result Review Denied
      (3) Date of result and citation, if known May 27, 1987
      (4) Grounds raised Same as direct appeal.

AO241 (Rev. 5/85)

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal: N/A

(1) Name of Court _____

(2) Result _____

_____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information: N/A

(a) (1) Name of court _____ _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

AO 241 (Rev. 5/85)

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

AO 241 (Rev. 5/85)

(j) Denial of right of appeal.

A. Ground one: Conviction obtained by a violation of petitioner's rights to due process and against self-crimination since trial court failed to specifically enforce plea bargain.

Supporting FACTS (state *briefly* without citing cases or law) Plea Agreement to allow petitioner to plead to reduced charge in exchange for his cooperation in the prosecution of a co-defendant. Petitioner substantially performed his duties under the Plea Agreement by providing information and testimony. Plea Agreement included no time limit for entry of guilty plea and prosectuion's subsequent insistence that plea be entered on a specific date violated the terms. Petitioner did not knowingly and voluntarily relinquish his rights under the Agreement.

B. Ground two: Prosecution barred by Article VI(b) of the Interstate Agreement on Detainers since petitioner was "mentally ill"; petitioner was entitled to an evidentiary hearing to establish mental illness.

Supporting FACTS (state *briefly* without citing cases or law):

Prior to his transfer from Washington to Oregon under the Interstate Agreement on Detainers, petitioner had been determined to be "mentally ill" or impaired by a mental defect. Pending trial in Oregon petitioner became mentally. The trial court's

AO 241 (Rev. 5/85)

hearing violated the Interstate Agreement on Detainers.

C. Ground three Petitioner's prosecution was barred under the speedy trial provisions of the Interstate Agreement on Detainers.

Supporting FACTS (state *briefly* without citing cases or law): On 11-20-82 Oregon took custody of petitioner under the I.A.D. Petitioner expressly consented to extensions of the speedy trial period totalling 29 days. On 4-11-83 the trial court quashed the original indictment. On 4-18-83 the State filed a second indictment. On 4-19-83 the State filed a third indictment and moved to dismiss the second indictment. Defendant's motion to set aside the indictment on statutory speed trial grounds was denied and the State's motion to postpone trial for an additional 30 days was granted improperly.

D. Ground four _____

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing William T. Lyons

AO 241 (Rev. 5/85)

(b) At arraignment and plea William T. Lyons, Michael J. Clancy

(c) At trial William T. Lyons, Michael J. Clancy

(d) At sentencing William T. Lyons, Michael T. Clancy

(e) On appeal John Daugirda

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any further sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be serve in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

[signature omitted in printing]
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12/10/89
(date)

/s/ Robert H. King Jr.